Volume 110 | Issue 1 Article 13

September 2007

Why Student Religious Speech is Speech

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WHY STUDENT RELIGIOUS SPEECH IS SPEECH

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I. INTRODUCTION

Though the question of whether oral sex is sex was once the subject of considerable legal controversy,[2] it may seem beyond dispute that student religious speech is speech. And so it is in one sense: almost no one would disagree with the proposition that student religious speech counts as speech for First Amendment purposes and that it is protected by the Free Speech Clause. In saying that student religious speech is speech, however, I mean something more. My claim is that student religious speech should be protected *only* as speech, and not as the free exercise of religion.

Professor Bowman and I agree that courts and lawyers tend to focus on the Free Speech Clause in litigation about student religious expression, and we agree that it is the Free Speech Clause that does the "heavy lifting" in the work

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[1] Associate Professor, West Virginia University College of Law. I thank Kristi Bowman for helping me to think about these matters through her own paper and for helpful comments on this one. I also thank Robert Bastress for his comments; Kevin Ku and Meghan Phillips for research assistance; Mary Claire Johnson, Meg Parker, and John Rayburn for editorial assistance; and the Hodges Foundation for its financial support of this project. All errors are mine.

[2] *See* Richard Lacayo, *When is Sex Not "Sexual Relations"?*, TIME, Aug. 24, 1998, at 38 (discussing President Clinton's assertion that oral sex does not constitute "sexual relations").

of protecting religious speech in the public schools.[3] If our positions differ, the difference is that I would go further than she does in insisting not only that the Free Speech Clause provides the only protection that most student religious speech *does* enjoy, but also that it provides the only protection that most student religious speech *should* enjoy. To my mind, the judicial focus on free speech in the sorts of cases discussed by Professor Bowman is not solely a matter of contingent litigation strategy, but also a matter of constitutional principle.

Professor Bowman concentrates on the issues raised by students wearing T-shirts imprinted with provocative, religiously motivated messages. Typical messages include statements condemning homosexuality or abortion as immoral or criticizing other religious traditions.[4] Such T-shirts raise problems for school administrators because the shirts may undermine school goals (e.g., the promotion of attitudes of tolerance and acceptance toward gay students), deeply offend and even threaten some students, or simply contribute to controversy and ill feeling that might distract students from learning the lessons the school is trying to teach. It is understandable why school administrators would not welcome this sort of expression with open arms, and even why they might move to suppress it if given the authority to do so. On the other side of the equation,

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[3] Kristi L. Bowman, *Public School Students' Religious Speech and Viewpoint Discrimination*, 110 W. VA. L. REV. 187, 190 (2007).

[4] *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1171 (9th Cir. 2006) (discussing T-shirt that read "Be Ashamed, Our School Embraced What God Has Condemned" on the front and "Homosexuality is Shameful 'Romans 1:27'" on the back), *cert. granted, judgment vacated, case remanded with instructions to dismiss as moot*, 127 S. Ct. 1484 (2007); Zamecnik *ex rel.* Zamecnik v. Indian Prairie Sch. Dist., No. 07 C 1586, 2007 WL 1141597, at *2 (N.D. Ill. Apr. 17, 2007) (discussing T-shirt that read "Be Happy, Not Gay"); Nixon v. N. Local Sch. Dist. Bd. of Educ., 383 F. Supp. 2d 965, 967 (S.D. Ohio 2005) (discussing T-shirt that read "Intolerant/Jesus said . . . I am the way, the truth, and the life./ John 14:6" on the front and "Homosexuality is a sin!/Islam is a lie!/Abortion is murder!/Some issues are just black and white!" on the back).

Professor Bowman's analysis has implications that go beyond T-shirt speech, of course, but she points to a variety of reasons why cases involving religious T-shirt speech pose the general constitutional issues in an especially sharp way. Bowman, *supra* note 3, at 199-201. I would add that litigation about student T-shirts may be especially common because messages on T-shirts are both more likely to be detected by school officials and harder for students to avoid than verbal remarks outside the classroom. While students who disagree with the message carried on a shirt are free to avert their eyes, *cf.* Cohen v. California, 403 U.S. 15, 21 (1971) (stating that persons exposed to a jacket inscribed with "Fuck the Draft" in a courthouse corridor "could effectively avoid further bombardment of their sensibilities simply by averting their eyes"), they cannot simply leave the school altogether. And while the work of the school day limits opportunities for students to express verbally their views about homosexuality, abortion, or the Iraq War, a shirt can broadcast students' preferred messages throughout the school day. For some examples of litigation involving T-shirts with nonreligious themes, see, e.g., *Barber v. Dearborn Public Schools*, 286 F. Supp. 2d 847, 849, 860 (E.D. Mich. 2003) (granting preliminary injunction to prevent school from banning T-shirt bearing a picture of President George W. Bush with a caption reading "International Terrorist"), and *Pyle v. South Hadley School Committee*, 861 F. Supp. 157, 158, 170 (D. Mass. 1994) (holding that school could ban T-shirts that read "See Dick Drink. See Dick Drive. See Dick Die. Don't be a Dick" and "Coed Naked Band: Do It To the Rhythm"), *state law rulings vacated and question certified to Sup. Jud. Ct. of Mass.*, 55 F.3d 20 (1st Cir. 1995).

however, stand the constitutional guarantees of freedom of speech and freedom of religion. For the student who wears a T-shirt citing Biblical authority for the proposition that "homosexuality is shameful," wearing the shirt can be both an act of religious witness and an expression of dissent from the school's official message. Protecting such countermessages may be important not simply as a matter of student liberty, but also as a check on school powers of indoctrination.[5] Schools that can silence opposing viewpoints—even in pursuit of worthy goals—threaten to become "enclaves of totalitarianism."[6]

Questions about how much protection this sort of speech enjoys and where that protection comes from are both important and interesting. Without pretending to do justice to her entire discussion, I take Professor Bowman to be making three principal points. First, she contends that it is the Free Speech Clause rather than the Free Exercise Clause that provides most of the protection for religious speech in the public schools.[7] Second, she argues that the Supreme Court's recent decision in *Morse v. Frederick* [8] basically leaves the status quo unchanged regarding constitutional protection for student religious speech.[9] Third, Professor Bowman suggests that the Supreme Court's student speech cases "can be read together as a body of law that permits schools to engage in limited viewpoint discrimination. . . ."[10] More specifically, she contends that restricting provocative, religiously motivated T-shirts likely would "involve viewpoint discrimination"[11] but that this sort of viewpoint discrimination may be compatible with the Supreme Court's decision in *Tinker v. Des Moines Independent Community School District.*[12] In passing, Professor Bowman makes a

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5 *See* MARK G. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW, AND GOVERNMENT EXPRESSION IN AMERICA 224-25 (1983); William G. Buss, *School Newspapers, Public Forum, and the First Amendment*, 74 IOWA L. REV. 505, 515 (1989).

6 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

7 Bowman, *supra* note 3, at 190.

8 127 S. Ct. 2618 (2007).

9 Bowman, *supra* note 3, at 215-19.

10 Bowman, *supra* note 3, at 192.

11 Bowman, *supra* note 3, at 219.

12 393 U.S. 503 (1969). As Professor Bowman points out, *supra* note 3, at 206-07, courts uniformly treat T-shirt speech as governed by the *Tinker* decision so long as the speech cannot be considered vulgar, lewd, or offensive under *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 683 (1986). *Compare, e.g.*, Guiles v. Marineau, 461 F.3d 320, 330-31 (2d Cir. 2006) (evaluating T-shirt that portrayed President George W. Bush as a former drug and alcohol abuser under *Tinker*), *with* Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 159 (D. Mass. 1994) (evaluating T-shirts including phrases "Don't be a Dick" and "Coed Naked Band" under *Fraser*), *state law rulings vacated and question certified to Sup. Jud. Ct. of Mass.*, 55 F.3d 20 (1st Cir. 1995). It would rarely be plausible to regard T-shirt speech as "school-sponsored" under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 263 (1988). The recent *Morse* decision apparently leaves unprotected any student T-shirt that could reasonably be construed as advocating or celebrating illegal drug use, but this rule affects only a small slice of the student speech universe.

fourth important point by suggesting that public forum doctrine is not useful in assessing most restrictions of student speech during school hours.[13]

Her first point is my main concern here, but I will offer a few reflections on the latter three points in Part I of the article before turning to that concern. In Part II, I begin by explaining why it matters whether religious activity is treated as speech or as religious exercise for First Amendment purposes. I then explain how and why courts and litigants have increasingly come to focus on the Free Speech Clause as the primary protector of religious liberty. In the public schools, however, free speech protections are sufficiently weakened that one might expect the Free Exercise Clause to assume greater importance in protecting student religious speech. This is all the more true, I suggest, because of the pervasive availability in the public school context of arguments invoking the "hybrid rights exception" to the free exercise doctrine established in *Employment Division, Department of Human Resources of Oregon v. Smith*.[14] Yet Professor Bowman is correct in her claim that the Free Speech Clause remains the real workhorse in the protection of student religious speech. I try to explain why this is so. I first review a variety of reasons why hybrid arguments in general, and free speech hybrid arguments in particular, have made little headway in the courts. I then argue that even a stronger reading of the Free Exercise Clause than is reflected in current law would make no difference in the amount of protection afforded to conventionally expressive student religious speech. This is true because most student religious speech *must* be characterized as speech rather than the exercise of religion; and once that characterization is made, the Free Speech Clause decrees that any preferential treatment of religious speech in relation to secular speech is unconstitutional content discrimination. It follows, to restate my thesis, that student religious speech is speech.[15] I conclude with some tentative reflections on the implications of my analysis for broader questions about the proper relationship between speech and free exercise protections for religious activity.

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13 Bowman, *supra* note 3, at 199 n.51.

14 494 U.S. 872 (1990).

15 I say this, of course, as an application of the general idea that some religious speech is so closely analogous to secular speech that it must be analyzed under speech principles forbidding content-based discrimination in favor of religious speech. The only thing distinctive about student speech in the context of this argument is that the kinds of speech opportunities available to students within the school day environment tend to be conventional forms of expression like wearing T-shirts, distributing literature, and verbal expression rather than the more complex forms of symbolic speech embodied in religious ritual and prayer. The former sorts of speech must be treated as speech, the latter need not be. *See infra* notes 167-175 and accompanying text.

II. PRELIMINARY OBSERVATIONS

A. Morse v. Frederick

Regarding Professor Bowman's second point, I agree that *Morse* adds little to the existing *Tinker-Fraser-Hazelwood* framework[16] for evaluating stu-

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[16] Professor Bowman, *supra* note 3, at 201-11, provides a clear summary of the way this framework is usually understood. Some of the most difficult questions about these cases concern the proper interpretation of *Hazelwood*. For example, does *Hazelwood* turn completely on the idea that some student speech could reasonably be perceived to carry the imprimatur of the school? Courts generally seem to reason this way, and sometimes go so far as to say that under *Hazelwood* school-sponsored speech simply *is* the speech of the school. *See, e.g.*, C.H. v. Oliva, 195 F.3d 167, 173 (3d Cir. 1999) (explaining that *Hazelwood* cannot be read to require viewpoint neutrality because it concerns "the school's own speech"), *aff'd in part en banc by an equally divided court, vacated and remanded in part*, 226 F.3d 198, 202-03 (3d Cir. 2000).

This way of thinking, however, is misleading in two ways. First, it obscures an important distinction between speech that is solely the school's and student speech that is school-sponsored (and thus is in some sense the speech of both the school and the student). Admittedly, worries about the thinness of this line and about mistaken attribution of student messages to the school are one prominent argument for the position that *Hazelwood* must be read to allow schools to engage in viewpoint discrimination so they can disassociate themselves from disagreeable or controversial messages. *Cf.* Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208, 1214-17 (11th Cir. 2004) (holding that under *Hazelwood* school could remove student painted murals with religious messages since those messages could easily be attributed to the school); Emily Gold Waldman, *Returning to* Hazelwood*'s Core: A New Approach to Restrictions on School-Sponsored Speech*, 60 FLA. L. REV. (forthcoming 2008), available at http://ssrn.com/abstract=1010383 (justifying the result in *Bannon* by suggesting at manuscript page 70 that "[a] reasonable observer is likely to perceive speech that has been permanently etched on school walls as the school's own, or, at the very least, as strongly indicative of the school's own views"). Nevertheless, it is far clearer that the school may engage in viewpoint discrimination with respect to speech that is solely its own than with respect to student speech that is school-sponsored. *See* Downs v. Los Angeles Unified Sch. Dist., 228 F.3d 1003, 1011 (9th Cir. 2000).

Second, reading *Hazelwood* as limited to the school's own speech is hard to square with the fact that the case is usually read to cover all student speech that is part of the curriculum (e.g., speech in classroom discussions, presentations, or student assignments), *see, e.g.*, *Oliva*, 195 F.3d at 174 (evaluating school's refusal to allow elementary school student to read a Bible story in class under *Hazelwood*); Settle v. Dickson County Sch. Bd., 53 F.3d 152, 155 (6th Cir. 1995) (evaluating school's restrictions on topic for an assigned paper under *Hazelwood*); Duran v. Nitsche, 780 F. Supp. 1048, 1054 (E.D. Pa. 1991) (same), even though a good deal of that speech could *not* reasonably be thought to bear the imprimatur of the school, *see Oliva*, 226 F.3d at 213 (Alito, J., dissenting) (stating that "nothing in *Hazelwood* suggests that its standard applies when a student is called upon to express his or her personal views in class or in an assignment"); *Settle*, 53 F.3d at 157-58 (Batchelder, J., concurring) (suggesting that student's choice to write a paper on the life of Jesus should not be governed by *Hazelwood* because "[t]here is no way to make a colorable claim that this paper is speech which might be viewed by the community as bearing the imprimatur of the school").

Perhaps there are good reasons why schools should be allowed to discriminate on the basis of viewpoint with respect to classroom speech; indeed, it has been suggested that this is an inescapable part of the educational process. KENT GREENAWALT, DOES GOD BELONG IN THE PUBLIC SCHOOLS? 168 (2005) (stating that schools try to instill some viewpoints at the expense of others and that this aim may be reflected in "viewpoint discriminatory" class assignments such as essays

dent speech claims, and that it is perhaps more important for what it did not say than for what it said.[17] Although *Morse* allows schools to engage in blatant viewpoint discrimination against student speech that advocates illegal drug use, its implications for the issue of viewpoint discrimination in general are (at least in the short term) quite limited. This is so, I suggest, because *Morse* creates a narrow category of low-value speech that encompasses only student advocacy of illegal drugs, thereby removing that speech from the protection of the First Amendment.[18] Though the Court does not use the terminology of low-value speech, this is the reading on which the case makes the most sense.

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requiring students to write about, e.g., the value of honesty, respect, or religious liberty); Robert C. Post, *Between Governance and Management: The History and Theory of the Public Forum*, 34 UCLA L. REV. 1713, 1825 (1987) (stating that viewpoint discrimination is a "regular and unavoidable aspect" of the government's efforts to manage speech within the confines of government institutions including public schools). But if viewpoint discrimination regarding classroom and assignment speech is acceptable, it is not because this speech is functionally equivalent to the school's own speech. For an interesting argument that the permissibility of viewpoint discrimination under *Hazelwood* ought to vary with the degree of school sponsorship, see Waldman, *supra*, at 64-78.

[17] Bowman, *supra* note 3, at 219-21.

[18] Low-value speech is not always completely devoid of constitutional protection, *see* Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297, 331-32 (1995) (explaining that "definitional balancing" is the principal method the Court uses for protecting speech that has low value but not the lowest value), but under *Morse* pro-drug speech in the schools appears wholly unprotected because the state may restrict such speech on the basis of nothing more than a finding that the speech could reasonably be understood to advocate illegal drug use.

The whole apparatus of low-value speech is controversial because it necessarily involves content-based discrimination. It is the speech's content that renders it low in value. R.A.V. v. City of St. Paul, 505 U.S. 377, 383-84 (1992). Accordingly, the Supreme Court's willingness to create a new ad hoc category of low-value speech in *Morse* does not bode well for its commitment to principled speech protection in the schools or for the elegance of First Amendment doctrine. *Cf.* Harry Kalven, *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 10, 17-19 (objecting to the Court's adoption of a "two-level" approach to the First Amendment in obscenity cases and warning that it might "have unhappy repercussions on the protection of free speech generally"). At least for now, however, it is some solace that *Morse* appears to be a case about illegal drug use and nothing more. One is tempted to say that the First Amendment has joined the Fourth as a casualty of the War on Drugs, albeit on a much smaller scale. *See, e.g.*, Gerald G. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 755 (2006) ("Considerable privacy interests and civil liberties were sacrificed to law enforcement during the last three decades of the twentieth century in the name of the war on drugs."); William J. Stuntz, *Warrants and Fourth Amendment Remedies*; 77 VA. L. REV. 881, 942-43 (1991) (explaining that the Supreme Court's reluctance to use warrants to combat police perjury "might be seen as a movement toward the position most consistent with aggressive prosecution of drug cases . . . [and this] . . . may be one of the most important, but least noticed, ways in which the criminal justice system has been shaped by the needs of the war against drugs.").

It may also seem odd to talk about advocacy of illegal drug use as being low-value speech "in the schools," as one might think that speech is either low in value or it is not. But *Fraser* is commonly read to treat speech that is lewd or offensive in its manner of expression as low-value speech in the schools even though such speech enjoys more protection elsewhere. *See, e.g., Oliva*, 226 F.3d at 211 (Alito, J., dissenting) (stating that "[i]n the public schools, low-value speech, such

Both the Court's opinion and Justice Alito's concurrence try to draw a link between the school's authority to restrict student speech advocating illegal drug use and student safety.[19] Their reasoning about the nature of the link is less than clear, however. If the rationale is that the speech will lead students to use drugs and thereby jeopardize their safety, one would expect some specific showing that a "Bong Hits 4 Jesus" banner would actually influence student choices, and nothing approaching such a showing was present in *Morse*.[20] The linkage, as far as I can discern, is meant to be provided by the Court's claims that peer pressure is an extraordinarily important influence on student drug use and that a school's tolerance of pro-drug student messages undermines student belief in the seriousness of the school's anti-drug commitment and thus contributes to an atmosphere of pro-drug peer pressure.[21] This line of thought would explain why a school must have broad authority to restrict student advocacy of illegal drug use, though one might question whether the majority's premises are compatible with views some of its Justices have expressed on other occasions.[22] But this

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as vulgar and offensive language, may be restricted to a greater extent than would otherwise be permissible"); *see also* Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007) ("Had Fraser delivered the same speech in a public forum outside the school context, it would have been protected."); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682-83 (1986) (stating that "the First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket" (quoting Thomas v. Bd. of Educ., Granville Cent. Sch. Dist., 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring))).

19 *Morse*, 127 S. Ct. at 2628-29; *id.* at 2638 (Alito, J., concurring).

20 *Id. at* 2659 (Stevens, J., dissenting) ("The notion that the message on this banner would actually persuade either the average student or even the dumbest one to change his or her behavior is most implausible."); *cf.* JOHN MAYER, *Belief, on* CONTINUUM (Columbia Records 2006) ("Is there anyone who ever remembers changing their mind from the paint on a sign?"). I would not wish to overstate John Mayer's contributions to First Amendment theory or to underestimate the power of political advocacy, but the lyrical observation seems entirely appropriate in relation to a banner like "Bong Hits 4 Jesus."

21 *Morse*, 127 S. Ct. at 2628 (stating that "school boards know that peer pressure is perhaps 'the single most important factor leading schoolchildren to take drugs,' and that students are more likely to use drugs when the norms in school appear to tolerate such behavior" (quoting Bd. of Educ. of Indep. Sch. Dist. No. 92 of Pottawatomie County v. Earls, 536 U.S. 822, 840 (2002) (Breyer, J., concurring))); *id.* at 2629 (stating that when Frederick unfurled his banner, it was reasonable for the principal to conclude that "failing to act would send a powerful message to the students in her charge . . . about how serious the school was about the dangers of illegal drug use").

22 Justice Scalia signed the majority opinion in *Morse*, yet ridiculed Justice Kennedy's majority opinion in *Lee v. Weisman*, 505 U.S. 577 (1992), for relying so heavily on the notion of peer pressure. *Id.* at 641 (Scalia, J., dissenting) (distinguishing between genuine legal coercion and "ersatz, 'peer-pressure' psycho-coercion"). In fairness, it can be said that perhaps Justice Scalia's *Weisman* dissent does not doubt the force or reality of peer pressure itself so much as doubt whether peer pressure should count as legal coercion by the state for purposes of the Establishment Clause. Justice O'Connor's plurality opinion in *Board of Education of Westside Community Schools v. Mergens*, 496 U.S. 226 (1990), states that "[t]he proposition that schools do not endorse everything they fail to censor is not complicated" and that "secondary students are . . . likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id.* at 250. Justice Kennedy (joined by Justice Scalia) refrained from

peer pressure argument, even if accepted, would not explain every aspect of *Morse*. For the Court, and most explicitly for Justices Alito and Kennedy, there is a key distinction between speech celebrating or advocating illegal drug use and speech that advocates political change.[23] Specifically, the opinions in *Morse* imply that "Bong Hits 4 Jesus" (interpreted to mean roughly "Use marijuana—even though it is illegal") may be restricted without any specific showing of disruption, but "Legalize Marijuana" may only be restricted if the school can prove a substantial disruption or an invasion of the rights of others under *Tinker*.[24] I do not think this is a sensible line to draw if the concern is taking a hard line against pro-drug peer pressure. To advocate the legalization of marijuana or any other drug is to imply that drug use is not so bad or dangerous as conventional wisdom would suggest; and if tolerance of "Bong Hits 4 Jesus" signals a lack of commitment in the school's anti-drug message, it is unclear why tolerance of "Legalize Marijuana" does not do the same thing. The difference in treatment must be a function of the content of the speech.[25] "Legalize marijuana" is political advocacy, traditionally high-value speech[26]; "Bong Hits 4 Jesus" is (at least in the Court's eyes) an incitement to illegal action, tradition-

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joining this part of Justice O'Connor's opinion, but expressed no disagreement with these statements. *Id.* at 258-62 (Kennedy, J., concurring in part and concurring in the judgment).

[23] *Morse*, 127 S. Ct. at 2625 (stating that "this is plainly not a case about political debate over the criminalization of drug use or possession"); *id.* at 2636 (Alito, J. concurring) (stating that he joins the majority opinion on the understanding that it "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue," including issues about the war on drugs and the merits of legalizing marijuana use). Because this caveat is a condition for Justice Alito's and Justice Kennedy's votes joining the majority opinion, it arguably operates as the narrowest ground for the decision in *Morse* and therefore should be treated as controlling. *Cf.* Marks v. United States, 430 U.S. 188, 193 (1977) (announcing the "narrowest grounds" doctrine for determining the holding of a case where there is no majority opinion). It is important to appreciate, however, that even if controlling, the Alito concurrence's implications are relatively narrow. Justice Alito's caveat that the majority opinion "provides no support for any restriction of speech that can plausibly be interpreted as commenting on any political or social issue" simply says that *Morse* could not justify such restrictions and leaves open the possibility that the Court's other student speech cases would allow the restriction of speech commenting on political or social issues. In other words, I think Justice Alito was simply trying to limit the degree to which *Morse* augments pre-existing school authority to regulate speech, not to cut back on the authority already present under *Tinker*, *Hazelwood*, and *Fraser*.

[24] *Morse*, 127 S. Ct. at 2637 (Alito, J., concurring). As explained in the previous note, I take Justice Alito's concurrence to be controlling on this point.

[25] Shaman, *supra* note 18, at 299, distinguishes between speech restrictions turning on the low value of the speech and those turning on harms associated with the speech. Despite the rhetorical appeals to student safety, I think *Morse* clearly emerges as a low-value speech case if one asks whether it can plausibly be said that banners advocating illegal marijuana use have a stronger causal connection to the harms of student drug use than banners calling for the legalization of marijuana.

[26] *See* Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (per curiam); Young v. Am. Mini Theatres, Inc., 427 U.S. 50, 70 (1976) (plurality opinion); Paul B. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 207 (1982) ("Perhaps the leading theme in the Supreme Court's cases is the primacy of political speech.").

ally low-value speech.[27] The difference in the value of the speech explains why the *Morse* Court would provide much more protection for the first message than for the second.[28]

B. *Viewpoint Discrimination under* Tinker

With respect to Professor Bowman's third point about viewpoint discrimination, I would argue that *Tinker* does not allow schools to engage in purposeful viewpoint discrimination, but does allow schools to regulate substantially disruptive student speech in ways that have viewpoint discriminatory effects. I develop this position fully in a companion piece to this response,[29] so what I say here will necessarily be brief to the point of being cryptic. In my view, the first and most important source of protection for the sort of controversial religious T-shirts discussed by Professor Bowman continues to be the *Tinker* test as conventionally understood. Such shirts may only be restricted if the school can prove substantial disruption or (perhaps[30]) interference with the

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[27] Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 194-95 (1983) (stating that the Supreme Court treats incitement to unlawful activity as low-value speech). *But see* Shaman, *supra* note 18, at 299 (arguing that Stone is wrong to classify incitement as low-value speech). Obviously, the *Morse* standard for what counts as unprotected "incitement" of illegal drug use in the public schools is vastly less demanding than the usual standard for incitement. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (stating that the First Amendment does not allow the state "to forbid or proscribe advocacy of . . . law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"). *Morse* does not require that advocacy of illegal drug use be likely to produce such action at all, let alone imminently, *see supra* note 20 and accompanying text, and it makes no distinction between express incitement to illegal activity and mere "celebration" of that activity. *Morse*, 127 S. Ct. at 2625 (stating that "we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion"). At least for now, *Morse's* holding appears to be limited to speech that is "reasonably viewed as promoting illegal drug use" and does not extend to speech advocating other sorts of illegal activity. *Id.*

[28] As noted by Professors Bowman and Volokh, there are significant line drawing problems here since a lot of speech (including, arguably, even the banner in *Morse*) can be reasonably interpreted either as advocating illegal drug use or as calling for the legalization of drug use. Bowman, *supra* note 3, at 216 n.136. This makes it unclear how one can square the majority opinion's rule that schools may proscribe speech that can reasonably be interpreted as promoting illegal drug use with Justice Alito's insistence that the opinion not be read to allow restriction of speech that "can plausibly be interpreted as commenting on any political or social issue." *Morse*, 127 S. Ct. at 2636 (Alito, J., concurring).

[29] John E. Taylor, Tinker and Viewpoint Discrimination (Nov. 5, 2007) (unpublished manuscript, on file with the WEST VIRGINIA LAW REVIEW).

[30] In *Harper v. Poway Unified School District.*, 445 F.3d 1166, 1171 (9th Cir. 2006), *cert. granted, judgment vacated, case remanded with instructions to dismiss as moot*, 127 S. Ct. 1484 (2007), the Ninth Circuit upheld a school's authority under *Tinker* to restrict a T-shirt condemning homosexuality by relying on the idea that the shirt interfered with the rights of gay and lesbian students. As Professor Bowman's discussion indicates, *Harper* gives far more bite to the "rights of others" prong of *Tinker* than it is usually taken to have. Bowman, *supra* note 3, at 205-07.

rights of others. The degree of the protection here depends on how much evidence of disruption courts require and on whether courts give independent significance to the "rights of others" prong. Courts take different stances on both these matters, but often the protection afforded by the conventional reading of *Tinker* is substantial.[31] I believe that *Tinker* also can and should be read to prohibit purposeful viewpoint discrimination, and this reading provides some additional protection for controversial religious (as well as non-religious) speech. Even speech that is substantially disruptive or interferes with the rights of others should still be protected if there is evidence of differential enforcement that suggests purposeful viewpoint discrimination by school officials.[32]

These protections are significant, but I suspect they fall well short of what is desired by those who wish to maximize protection for controversial religious speech in the public schools. On the most protective view, showing that a school has restricted a controversial religious point of view without muzzling that view's competitors would—*without more*—establish unconstitutional viewpoint discrimination.[33] In other words, this reading of *Tinker* would require schools to ensure that restrictions on student speech have no significant viewpoint-differential effects. In practice, this would mean that a school worried about the disruptive effects of student speech condemning, e.g., homosexuality would face a choice between leaving that speech unrestricted and broadening its restriction to include the entire subject-matter at issue. Even if we can coherently decide how broad the restriction would have to be to count as the regulation of subject matter rather than (religious) viewpoint,[34] requiring either very

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Although the Supreme Court's disposition of *Harper* means the case is no longer binding law in the Ninth Circuit, its aggressive use of the "rights of others" prong might still prove influential.

[31] For decisions protecting provocative speech under *Tinker*, see, e.g., *Chandler v. McMinnville School District*, 978 F.2d 524, 526, 530-31 (9th Cir. 1992) (protecting students' buttons with the word "scab" referring to replacement teachers during a strike), and *Barber v. Dearborn Public Schools*, 286 F. Supp. 2d 847, 849, 860 (E.D. Mich. 2003) (protecting T-shirt with picture of President George W. Bush and a caption reading "International Terrorist").

[32] In the reported cases applying *Tinker*, this possibility is raised most directly by the Sixth Circuit's decision in *Castorina v Madison City School Board*, 246 F.3d 536 (6th Cir. 2001). There, the school had suspended students for wearing T-shirts that included images of the Confederate flag (among others) but had allegedly allowed students to wear shirts bearing an "X" (for Malcolm X). The court remanded for further fact finding on how the school had dealt with the "X"-shirts and on the degree of disruption (if any) caused by both the Confederate flag shirts and the "X" shirts. *Id.* at 544. In my view, findings on remand that both shirts had been disruptive but that only the Confederate flag shirts were restricted would raise a strong inference of purposeful viewpoint discrimination and would render the school's restriction of only the Confederate flag shirts unconstitutional even if the wearing of those shirts had led to substantial disruption.

[33] The "more" that I would require is evidence that the school has restricted only one side of a controversy not because of judgments about differences in the harms associated with the speech, but because of sympathy or disagreement with the ideas expressed. Because evidence of differential effects can be evidence of improper intent, disentangling one from the other is a significant hurdle. I discuss this and other problems in Tinker and Viewpoint Discrimination, *supra* note 29.

[34] This is no easy task. Perhaps a school that restricts T-shirts proclaiming that homosexuality is shameful must also restrict shirts saying "Gay? Fine by Me" to achieve viewpoint neutrality.

broad speech restrictions or none at all would put schools to a Hobson's choice and might make them significantly less likely to restrict student religious speech. Reading this kind of a viewpoint-neutrality requirement into *Tinker* would significantly increase protection for controversial religious speech, but would do so at great potential cost to school authority over the educational environment. I argue in my companion piece that the existing case law does not and should not read *Tinker* to require that student speech regulations have viewpoint-neutral effects.

C. *Student Speech and Public Forum Doctrine*

Professor Bowman briefly makes a fourth point in observing that the categories of public forum doctrine are unhelpful in analyzing student speech that occurs during the school day while school is in session. I agree. Though I do not have the space here for a full discussion, I want to sketch three reasons why I believe there is usually no need to use public forum doctrine when students speak in the context of normal school operations.[35] In such contexts, public forum doctrine tends to be either superfluous or pernicious.

My first point is that the applicable Supreme Court precedents do not require running every student speech case through the mill of public forum doctrine. Of the Court's cases governing student speech during the school day, only *Hazelwood* uses forum analysis, and on my reading, it does so *only* to rebut the argument that the school had relinquished its rights to editorial control over the

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Must it also restrict a shirt that says "Tolerance," or does that address a different subject matter? Must a school that restricts Confederate flag shirts also restrict shirts with an image of black and white hands clasped in harmony? *Cf.* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 750 (5th Cir. 1966) (describing "freedom buttons" worn by African-American students which depicted "a black and white hand joined together with 'SNCC' inscribed in the margin"). On the difficulty of drawing the subject matter/viewpoint distinction, see Wojciech Sadurski, *Does the Subject Matter? Viewpoint Neutrality and Freedom of Speech,* 15 CARDOZO ARTS & ENT. L.J. 315, 354 (1997) ("One way of viewing the difficulties in characterizing a regulation as content-neutral, content-based, or viewpoint-based is that it largely depends on the level of generality of the question asked.").

[35] It is important to be explicit about the limits of my point. I do not deny that forum doctrine retains whatever usefulness it generally has in cases involving after-hours access to school property for community and student groups. Forum doctrine also seems appropriate where non-student groups seek to distribute literature by coming onto school property or using school distribution channels. *See, e.g.*, Child Evangelism Fellowship of N.J., Inc. v. Stafford Township Sch. Dist., 386 F.3d 514 (3d Cir. 2004) (using forum doctrine to evaluate exclusion of religious group from school's channels for distribution of community materials to students). Situations where students distribute literature are more complex, and courts have differed over whether forum analysis is appropriate in these kinds of cases. *Compare* Muller v. Jefferson Lighthouse Sch., 98 F.3d 1530, 1539-40 (7th Cir. 1996) (applying forum doctrine to analyze a student's distribution of invitations to a religious meeting at his church) *with* Rivera v. East Otero Sch. Dist. R-1, 721 F. Supp. 1189, 1192-93 (D. Colo. 1989) (applying *Tinker* and explicitly refusing to use forum doctrine where students sought to distribute a free, non-student religious newspaper called *Issues and Answers*).

student newspaper by creating a limited public forum for wide open expression by student journalists.[36] It seems clear that a school *could* choose to do this, and that if the school did so it would be required to honor the terms of the forum it created.[37] In *Hazelwood*, this would have meant that any content-based regulation of speech falling within the defined boundaries of the forum would have been subjected to strict scrutiny and the students would presumably have won their case. The Court simply rejected the argument that the school had taken the actions necessary to create this kind of forum. It did not go on to say—let alone hold—that public schools must always be treated as *some* kind of forum when students challenge restrictions of their speech during school hours.

Hazelwood, then, teaches that forum doctrine can be relevant when there is evidence that a school has voluntarily renounced some of its usual authority over student speech in particular contexts. My second point is that in the absence of such evidence, the general concerns of forum doctrine do not mesh well with questions about a school's regulatory authority over the speech of its students during school hours. This may be one of the reasons the Court says relatively little about it in *Tinker*, *Fraser*, *Hazelwood*, and *Morse*.[38] Public forum doctrine, as Douglas Laycock has pointed out, generally comes into play when speakers seek rights of speech and access to government property.[39] But during regular school hours there is no question of access rights for students—their presence is the whole point of having a school. Thus it makes little sense

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[36] Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 267-70 (1988). This is Part II-A of the Court's opinion, which culminates in the assertion that "[s]chool officials did not evince ... any intent to open the pages of Spectrum to 'indiscriminate use' by its student reporters and editors, or by the student body generally." *Id.* at 270. Having rejected the claim that a public forum was created, the Court then goes on to discuss the category of school-sponsored speech without any further mention of forum doctrine. *See* Waldman, *supra* note 16, at 10. The chief obstacle to my reading is that at the end of Part II-A, the Court cites a public forum case in announcing that the school could regulate the student newspaper "in any reasonable manner." *Id.* (citing Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 47 (1983)). This reference is some evidence that the Court thought of the *Hazelwood* case as an application of the general standards governing nonpublic fora, but in my view the absence of any further reference to forum doctrine (or, more specifically, to *Perry's* prohibition on viewpoint discrimination even in nonpublic fora) in the opinion outweighs this evidence and I therefore regard the reference to *Perry* as a throw-away.

[37] Rosenberger v. Rectors and Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (stating that "[o]nce it has opened a limited forum, . . . the State must respect the lawful boundaries it has itself set."); Jay Alan Sekulow, James Henderson & John Tuskey, *Proposed Guidelines for Student Religious Speech and Observance in Public Schools*, 46 MERCER L. REV. 1017, 1030 (1995).

[38] My claim may be somewhat overstated with respect to *Tinker*, for it has been argued that "public forum doctrine" as we know it today did not exist until 1972, three years after *Tinker* was decided. *See* Post, *supra* note 16, at 1714.

[39] Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 NW. U. L. REV. 1, 48 (1986); *cf.* Post, *supra* note 16, at 1781 (highlighting similarities between public forum cases and decisions concerning the internal management of speech by government employees and suggesting that public forum cases deal with situations where the government's authority to manage speech internal to government institutions is called into question by a member of the general public rather than a member of the institution).

to ask questions about whether a school has "intentionally opened up" its classrooms and hallways for speech by students during the school day as opposed to retaining control over these areas of the school as a nonpublic forum.[40]

Third, public forum doctrine is beset with so many intellectual difficulties in its home context that it seems positively perverse to import it into student speech cases unless the law demands it. (And, as my first point indicates, it does not.) Few doctrines have been so heavily and uniformly criticized,[41] and much of that criticism is dominated by a common theme: forum doctrine's excessive focus on "the character of the government property at issue" and its use of a small number of categories produce a set of legal rules that is formalistic in the extreme, showing little connection to the sorts of policies at issue when citizens seek to exercise their speech rights on government property.[42] If public forum doctrine in its home context has been widely derided for its excessive formalism, what are we to say of the following line of argument? "Schools are public property so they must be *some* kind of forum, and even in a nonpublic forum viewpoint restrictions are extremely difficult to justify, so schools must not be allowed to engage in viewpoint discrimination even with respect to speech that is part of the school curriculum."[43] This might or might not be the correct answer, but I would characterize this mode of argument as formalism that is not merely excessive but positively mindless. Completely absent is any consideration of what I think is the right question: do schools need the ability to engage in viewpoint discrimination to carry out their educational missions?[44] In

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[40] The senselessness of such questions is illustrated by the analysis in *Slotterback v. Interboro School District*, 766 F. Supp. 280 (E.D. Pa. 1991). There, the court observed that it is "intrinsic to the dedication of a school" that an open forum for student speech is created. *Id.* at 293. Functionally, of course, this serves as a way of minimizing the importance of forum doctrine on student speech cases and therefore shows good instincts on the part of the court. But the whole point of forum doctrine (outside the context of the traditional public forum, which all agree is not the relevant category for public schools) is that the government can choose whether and to what extent to open up its property as a forum for expression. To speak of "intrinsic dedications" to communicative purposes is a tacit admission that the language of public forum doctrine has been carried too far from the contexts where it might prove useful.

[41] Post, *supra* note 16, at 1716 n.7 (collecting critical articles).

[42] *See, e.g.*, Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 93 (1987) (stating the questions posed by public forum doctrine are "the wrong questions" and that First Amendment rights on public property "should turn not on the common law property rights of the government . . . but on a reasonable accommodation of the competing speech and governmental interests").

[43] *Cf.* Peck v. Baldwinsville Cent. Sch. Dist., 426 F.3d 617, 626-27 (2d Cir. 2005) (finding that the school was a nonpublic forum because it had taken no affirmative steps to open itself up for public use); *id.* at 633 (ruling that *Hazelwood* prohibits viewpoint discrimination because it cited public forum cases that prohibited viewpoint discrimination even in nonpublic fora).

[44] The formulation of the question here is indebted to Post, *supra* note 16, who suggests that public forum cases, public employee speech cases, and student speech cases share common ground in that all concern the government's "managerial" authority over speech within government institutions. *Id.* at 1767-83. In all these cases, the fundamental question is "whether the

the main run of student speech cases, courts would do better to focus on this type of question and forget about the categories of public forum doctrine.

III. FREE SPEECH AS THE WORKHORSE IN PROTECTING STUDENT RELIGIOUS EXPRESSION

I now turn to my principal topic and Professor Bowman's first point: that it is the Free Speech Clause and not the Free Exercise Clause that is the true workhorse in the protection of student religious expression in the public schools. I believe this claim is true, and that its truth is overdetermined in ways that I will explain more fully in a moment. I will suggest, however, that there is at least a bit of a puzzle about *why* it should be true in the public school context. Solving that puzzle can show us something important about the relationships between the Free Speech Clause and the Free Exercise Clause.

A. *Speech or Religious Exercise: A Choice of Characterization*

It seems clear that a great deal of religious activity can be classified as both the exercise of religion and as speech. Lots of the things religious people do—preaching, proselytizing, praying, offering witness—are conventionally expressive activity, and have long been recognized as speech by the Supreme Court.[45] Further, a good deal of religiously motivated conduct that is not conventionally expressive arguably qualifies as symbolic speech under *Spence v. Washington*.[46] It has been suggested that even core religious rituals like Christian communion may be seen as intended (and understood) communications and thus as symbolic speech.[47] It also seems clear that categorizing an instance of religious activity as speech or as religious exercise can have significant doctrinal

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authority to regulate speech is necessary for the achievement of legitimate institutional objectives." *Id.* at 1771.

[45] *See, e.g.*, Widmar v. Vincent, 454 U.S. 263, 269 (1981) (characterizing "religious worship and discussion" as "forms of speech and association protected by the First Amendment"); Murdock v. Pennsylvania, 319 U.S. 105, 108-09 (1943) (protecting religious solicitation by Jehovah's Witnesses on both free speech and free exercise grounds); Cantwell v. Connecticut, 310 U.S. 296, 307 (1940) (same).

[46] 418 U.S. 405, 410-11 (1974) (stating that conduct qualifies as speech if intended to "convey a particularized message . . . [and] . . . in the surrounding circumstances the likelihood was great that the message would be understood by those who viewed it").

[47] Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 75 (2001) ("The act of communion is intended as a communication by the congregants to each other and, more importantly, to their God, and non-congregants in our society generally understand the act of communion as a communication of some sort."). At the same time, Tushnet notes that portraying a ritual like communion simply as speech is an unsatisfyingly thin description. *Id.* at 75 n.21; *cf.* Alan Brownstein, *Protecting Religious Liberty: The False Messiahs of Free Speech Doctrine and Formal Neutrality*, 18 J.L. & POL. 119, 185 (2002) ("Treating religion as speech simply leaves too many other aspects of religion out of the picture on the constitutional cutting room floor.")

consequences.[48] Specifically, the Free Exercise Clause (at least in circumstances where it retains significant force) is usually read to privilege religiously motivated conduct over analogous secular conduct,[49] while the Free Speech Clause is generally understood to require that religious speech be treated neither better nor worse than analogous secular speech.[50] We know, then, that some

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[48] Brownstein, *supra* note 47, describes various ways in which the possibility of characterizing religious activity both as speech and as religion can lead to doctrinal conflicts:

> Religious speakers might demand special free exercise protection against content-neutral laws restricting speech that secular speakers must obey. Statutory exemptions from content-neutral regulations for religious speakers might be challenged on Speech Clause or Establishment Clause grounds and defended on free exercise grounds. Restrictions on religious expression might be both challenged on free exercise or free speech grounds, and defended, if the speech received government support or communicated a message of government endorsement, on Establishment Clause grounds.

Id. at 130. Brownstein explains that during the 1980's, the Supreme Court began to confront cases in which these conflicts were impossible to ignore. *Id.*

[49] *See, e.g.*, Wisconsin v. Yoder, 406 U.S. 205, 215-16 (1972) (stating that the Amish's religiously-rooted desire to separate themselves from contemporary society was entitled to First Amendment protection whereas a philosophical choice of separation in the manner of Thoreau would not be). The extent of this privileging will of course depend on how strong free exercise protection is understood to be, and after *Employment Division v. Smith*, 494 U.S. 872 (1990), it could be said that in most cases the Free Exercise Clause no longer privileges religious exercise because it does not protect religious exercise at all. *But cf.* note 67 *infra* (discussing the scholarly debate about the degree to which post-*Smith* free exercise law still provides meaningful protection). Still, it remains the case that wherever the Free Exercise Clause does have significant force, it will sometimes provide more protection for religiously motivated conduct than for analogous secular conduct. For example, *Sherbert v. Verner*, 374 U.S. 398 (1963), survives *Smith* on the ground that it involved a system of individualized exemptions. *Smith*, 494 U.S. at 884. This means that even after *Smith*, a person denied unemployment compensation because she refused to take a job that would have required her to work on her Sabbath would have a greater chance of obtaining judicial relief than a person who refused the same job because of her inability to find adequate weekend child care. The argument that free exercise law should not generally be understood to privilege religiously motivated conduct over secular claims of conscience is pressed most vigorously by Provost Christopher L. Eisgruber and Dean Lawrence G. Sager in RELIGIOUS FREEDOM AND THE CONSTITUTION 112-18 (2007) [hereinafter EISGRUBER & SAGER, RELIGIOUS FREEDOM] and in earlier articles including *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1291-97 (1994).

[50] In *Heffron v. International Society for Krishna Consciousness, Inc.*, 452 U.S. 640 (1981), the Court stated:

> None of our cases suggest that the inclusion of peripatetic solicitation as part of a church ritual entitles church members to solicitation rights in a public forum superior to those of members of other religious groups that raise money but do not purport to ritualize the process. Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairgrounds superior to those of other organizations having social, political, or other ideological messages to proselytize. These nonreligious organizations seeking support for their activities are entitled to rights equal to those of religious groups to enter a public forum and spread their views, whether by soliciting funds or by distributing literature.

religious activity *can* be treated either as religion or speech and that the choice matters.[51] Yet the questions of whether and when to treat religious activity as speech remain remarkably undertheorized in the case law and even (though to a lesser extent) in the commentary.[52]

There are, of course, many possible positions here. To name just a few, one could treat as speech all religiously motivated activity that can be treated as speech while regarding the Free Exercise Clause as largely superfluous.[53] One could say that even the most conventionally speech-like religious activity should be protected by the Free Exercise Clause but not by the Speech Clause—the position advocated by Justice White in his *Widmar v. Vincent* dissent but emphatically rejected by the Court.[54] One could try to identify some sorts of religious activity that should be treated only as speech,[55] while treating other religious activity as protected only by the Free Exercise Clause or as doubly pro-

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Id. at 652-53; *see also* Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 766 (1995) (plurality opinion) ("Of course, giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)"); Kreisner v. City of San Diego, 1 F.3d 775, 790 (9th Cir. 1993) (Kozinski, J., concurring) ("Religious speech is *speech*, entitled to exactly the same protection from government restriction as any other kind of speech—no more and no less"); Alan E. Brownstein, *State RFRA Statutes and Freedom of Speech*, 32 U.C. DAVIS L. REV. 605, 612-25 (1999) (arguing persuasively and at length for the proposition that the Supreme Court case law is best read to say that religious speech gets neither more nor less protection than analogous secular speech).

51 Treating religious speech as the exercise of religion also brings Establishment Clause values more directly into play. The question of whether student speech that would be protected by the Free Speech Clause can nonetheless by restricted because of the Establishment Clause is obviously important, but it is beyond the scope of my concerns here. For detailed argument that the Establishment Clause sometimes reduces speech protections for religious student speech in the public schools, see generally Steven G. Gey, *When is Religious Speech Not "Free Speech"?*, 2000 U. ILL. L. REV. 379. My concern here is with the question of whether treating student religious speech as the exercise of religion could ever provide *more* protection than the Free Speech Clause would provide.

52 Brownstein, *supra* note 47, is the most helpful discussion I have encountered.

53 This is roughly the approach advocated by William P. Marshall in *Solving the Free Exercise Dilemma: Free Exercise as Expression*, 67 MINN. L. REV. 545 (1983). Tushnet, *supra* note 47, suggests that under the Supreme Court's current precedents the freedoms of speech and association provide essentially all the protection religious activity enjoys and that the Free Exercise Clause has thus been rendered "redundant."

54 Widmar v. Vincent, 454 U.S. 263, 283 (1981) (White, J., dissenting); *see also* Brownstein, *supra* note 47, at 182 (suggesting that the costs of treating religious activity as speech rather than as religion generally outweigh the benefits and that religious activity should be treated as speech only "sometimes" and "with caution"). *But see Widmar*, 454 U.S. at 270 n.6 (rejecting Justice White's arguments).

55 *See* Eugene Volokh, *Intermediate Questions of Religious Exemptions – A Research Agenda With Test Suites*, 21 CARDOZO L. REV. 595, 613-16 (1999) (discussing three possible approaches for distinguishing religious activity that should count as speech from religious activity that should count as "nonspeech").

tected by both Clauses.[56] One could treat all religious behavior that can count as speech as doubly protected by both the Speech and Free Exercise Clauses, with the explicit proviso that religiously motivated speech should be treated as speech or as religion depending on which approach would offer the greatest protection.[57] Choices among these positions have significant consequences and, as Professor Brownstein points out, they should be made self-consciously with careful attention to the costs and benefits of each option. [58]

The Supreme Court has not been especially self-conscious in its few pronouncements on the speech versus religion issue, often ignoring obvious questions or making significant choices without argument or explanation.[59] Yet we know at least that the Supreme Court in *Widmar* squarely rejected the idea that expressive religious activity should be protected only by the Free Exercise Clause. Instead, the Court took and continues to take the position that conventionally expressive religious activities, even activities like worship and prayer that have no obvious secular analogues, are fully protectable as speech: "private religious speech . . . is as fully protected under the Free Speech Clause as secular private expression."[60]

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[56] The problem with the "double protection" idea, however, is that (as I have already suggested) sometimes the implications of the Free Speech and Free Exercise Clauses point in different directions. Where this is so, the double protection strategy requires some decision rule indicating which principle trumps in situations of conflict.

[57] Perhaps this last position can be defended if one takes the idea of religion as a "preferred freedom" very seriously, but one could reasonably suspect that this approach is akin to having one's cake and eating it too. During the period when the Court discussed the freedoms of speech, press, and religion as "preferred freedoms," Justice Murphy's dissent in *Jones v. City of Opelika*, 316 U.S. 584 (1942), suggested that religious freedom was even more preferred than the freedoms of speech and press. *Id.* at 621 (Murphy, J., dissenting) ("Important as free speech and a free press are to a free government and a free citizenry, there is a right even more dear to many individuals – the right to worship their Maker according to their needs and the dictates of their souls and to carry their message or their gospel to every living creature."). But the Court seemed to repudiate this idea two years later. *See* Prince v. Massachusetts, 321 U.S. 158, 164 (1944) (suggesting that "it may be doubted that any of the [First Amendment's] great liberties . . . can be given higher place than the others"). For a good general discussion of the "preferred freedoms" approach to incorporation, see Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 FORDHAM L. REV. 459, 502-12 (2001).

[58] Brownstein, *supra* note 47, at 122-23.

[59] *See id.* at 131 (stating that the Court in *Heffron* "simply ignored two obvious questions," including the question of whether the Krishnas' solicitation should be understood as religion or speech); *id.* at 135-39 (commenting on the oddity of the Court's primarily treating *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), as an Establishment Clause case rather than a speech case).

[60] Capitol Square Review & Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (plurality opinion).

B. *Convergence on Speech as the Preferred Strategy for Protecting Religious Expression*

It is one thing to say that the Supreme Court has long been willing to treat much religious activity as speech and to protect it on that basis. It is another to explain how people with very different views have converged on the Free Speech Clause as the preferred vehicle for protecting religious expression both inside the schools and elsewhere.[61] Painting with a very broad brush, I would tell the story of this development in the following way.

On one side, we have people we can call "religionists."[62] They want to maximize the space for private religious expression in the public schools and in the public square, and wish religious practices to be as free from the burdens of government regulation as possible. For such people, a focus on Free Speech protection for speech-like religious activity is appealing because historically the Free Exercise Clause has always been weaker than the Free Speech Clause. In the Court's early cases involving Jehovah's Witnesses in the 1930's and 1940's, the Court often linked the Witnesses' free speech and free exercise interests, but stand-alone free exercise claims failed and the Speech Clause appeared to do the real work in cases where the Witnesses prevailed.[63] The Free Exercise Clause

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[61] *Cf.* Brownstein, *supra* note 47, at 184 (bemoaning the "uncritical acceptance" of the idea that religion should be conceptualized as speech to the greatest possible extent).

[62] It is hard to find relatively neutral terminology to label groups of people who may differ among themselves considerably. I have drawn this terminology from the helpful analysis in Ira C. Lupu & Robert Tuttle, *The Distinctive Place of Religious Entities in Our Constitutional Order*, 47 VILL. L. REV. 37 (2002), partly on the theory that "religionists" is a less loaded and perhaps more accurate label than "religious conservatives." All the usual caveats about labels and typologies apply, though the use of these kinds of ideal types has become commonplace in the Religion Clauses literature. *See, e.g.*, NOAH FELDMAN, DIVIDED BY GOD: AMERICA'S CHURCH-STATE PROBLEM—AND WHAT WE SHOULD DO ABOUT IT 7-8 (2005) (organizing discussion around division between "legal secularists" and "values evangelicals"). I should note that I am losing some of the flavor of Lupu's and Tuttle's label in borrowing it, for they construct a four-part typology that captures general attitudes on both Free Exercise and Establishment Clause issues. To give a *very* crude summary, they portray religionists as desiring a strong Free Exercise Clause and a weak Establishment Clause, separationists as desiring a strong Free Exercise Clause and a strong Establishment Clause, secularists as desiring a weak Free Exercise Clause and a strong Establishment Clause, and neutralists as desiring weak versions of both Clauses so as to maximize space for legislative discretion. Here, I am using "religionists" as a label that is broad enough to encompass anyone who wants aggressive protection of free exercise interests in the public schools, whether it is Douglas Laycock or the lawyers from the American Center for Law & Justice. In practice, though, the label is fairly apt here even if read more narrowly because the most aggressive champions of religious expression in the public schools are religionists in Lupu's and Tuttle's more precise sense. They wish to maximize the space for religious expression in the schools even at a cost to what others might see as Establishment Clause values. Separationists perform a more complex balancing act in seeing strong versions of both Clauses as necessary to a proper conception of religious liberty in the schools.

[63] Stephan M. Feldman, *The Theory and Politics of First Amendment Protections: Why Does the Supreme Court Favor Free Expression Over Religious Freedom?*, 8 U. PA. J. CONST. L. 431, 447-48 (2006). Feldman draws upon the theory of ingroup-outgroup differentiation to make the

remained weaker than the Speech Clause during the *Sherbert-Yoder* era,[64] when substantial burdens on the free exercise of religion were subjected to a form of strict scrutiny that turned out to be "strict in theory, but ever so gentle in fact." [65] The relative weakness of the Free Exercise Clause is all the more obvious after *Employment Division v. Smith*, where the Court declared that neutral and generally applicable laws that burden religious exercise do not violate the Free Exercise Clause.[66] Those who believe that *Smith* robbed the Free Exercise Clause of

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interesting if unflattering suggestion that speech claims were more successful than free exercise claims in the Jehovah's Witnesses cases because the latter more starkly emphasized claimants' differences from the mainstream and therefore were more likely to trigger the ingroup prejudices of Justices against outgroup claimants. *Id.* at 468-74.

[64] Sherbert v. Verner, 374 U.S. 398 (1963); Wisconsin v. Yoder, 406 U.S. 205 (1972). This era ran roughly from 1963 (the year of the *Sherbert* decision) to 1990 (the year of the Supreme Court's decision in Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872 (1990)). Depending on one's point of view, this period was either a brief window of light during which the Court showed at least a glimmer of appreciation for the importance of religious liberty, *see, e.g.*, Thomas C. Berg, *What Hath Congress Wrought? An Interpretive Guide to the Religious Freedom Restoration Act*, 39 VILL. L. REV. 1, 5-12 (1994) (outlining the narrative of free exercise law with the *Sherbert-Yoder*-RFRA approach as the hero and *Smith* as the villain), or an anomalous departure from an otherwise consistent adherence to the approach adopted in *Smith*, *see, e.g.*, MARCI HAMILTON, GOD VS. THE GAVEL: RELIGION AND THE RULE OF LAW 203-227 (2005) (sketching the counter-narrative with *Smith* and *City of Boerne v. Flores*, 521 U.S. 507 (1997), as protagonists).

[65] Ira C. Lupu, *The Trouble With Accommodation*, 60 GEO. WASH. L. REV. 743, 756 (1992).

[66] *Smith*, 494 U.S. at 885. Student speech restrictions on, e.g., speech denigrating other students on the basis of their sexual orientation would presumably count as neutral and generally applicable laws under *Smith* and thus would present no opportunity for a meaningful free exercise challenge. *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1187 (9th Cir. 2006) (stating that the plaintiff's free exercise argument against the school's restriction of his anti-gay T-shirt would "surely fail" under *Smith* because there was no evidence that the school's prohibition "was applied to him because of his religious views"), *cert. granted, judgment vacated, case remanded with instructions to dismiss as moot*, 127 S. Ct. 1484 (2007). One can imagine counter-arguments on this point, however. It could be asserted that such rules may be tainted by anti-religious animus, though this would be difficult to prove in the face of a school's argument that the point of such a rule is to create and sustain a good learning environment for gay and lesbian students, not to suppress religious speech. It could also be argued that school officials' judgments under *Tinker*'s substantial disruption standard allow so much potential for discretion and hence for veiled discrimination that they ought to be treated as falling within the "system of individualized exemptions" exception to *Smith*. *Smith*, 494 U.S. at 883-84 (explaining that *Sherbert v. Verner* and its progeny survive *Smith* because the "good cause" standard in unemployment compensation schemes involved "individualized governmental assessment of the reasons for the relevant conduct"); *cf.* Richard F. Duncan, *Free Exercise and Individualized Exemptions: Herein of* Smith, Sherbert, *Hogwarts, and Religious Liberty*, 83 NEB. L. REV. 1178, 1188 (2005) (arguing for an expansive construction of this exception to reach nearly any instance in which officials exercise discretionary authority). As to the latter argument, I share Professor Tushnet's sense that the "individualized exemptions" exception to *Smith* is difficult to square with *Smith* in any event and that if extended to this length it would essentially swallow the *Smith* rule. Tushnet, *supra* note 47, at 92 n.83.

nearly all its force[67] would naturally have strategic reasons for focusing on the Free Speech Clause as the only game in town for protecting religious liberty under the Federal Constitution.[68] In addition, religionists seeking to widen the space for religious expression in the public square have embraced the strategy of characterizing religious activity as speech as a way of defusing Establishment Clause concerns.[69] This strategy bore fruit in *Rosenberger v. Rectors and Visitors of University of Virginia*[70] and in the equal access decisions discussed by Professor Bowman.[71] The focus on speech made it possible to consider access to government property as a matter of equal treatment rather than as the illicit advancing of religion.[72] In light of these points, it is no surprise that religiously

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[67] There is an ongoing debate about whether the various exceptions recognized in *Smith* (particularly the idea that laws failing to be "neutral and generally applicable" should receive strict scrutiny) continue to provide nontrivial free exercise protections even in *Smith*'s wake. *Compare, e.g.*, Richard F. Duncan, *Free Exercise is Dead, Long Live Free Exercise*: Smith, Lukumi, *and the General Applicability Requirement*, 3 U. PA. J. CONST. L. 850 (2001) (arguing that many laws fail to be neutral and generally applicable because exemptions for various secular interests render the laws underinclusive with respect to their stated purposes), *and* Douglas Laycock, *The Supreme Court and Religious Liberty*, 40 CATH. LAW. 25 (2000) (same), *with* Daniel O. Conkle, *The Free Exercise Clause: How Redundant, and Why?*, 33 LOY. U. CHI. L.J. 95, 109 (2001) (expressing doubt that free exercise protection after *Smith* extends much beyond laws that target religion), *and* Frederick Mark Gedicks, *The Normalized Free Exercise Clause: Three Abnormalities*, 75 IND. L.J. 77, 114 (2000) (stating that a law only fails to be neutral and generally applicable under *Smith* and *Church of the Lukumi Babalu Aye v. Hialeah*, 508 U.S. 520 (1993), if the law is "so dramatically underinclusive that religious conduct is virtually the only conduct to which the law applies"). I need not enter that debate here; for present purposes, it is enough to point out that many people believe *Smith* provides precious little religious liberty protection and that this belief helps to motivate a focus on the Free Speech Clause.

[68] *See, e.g.*, Sekulow et al., *supra* note 37, at 1018 (identifying the idea that religious speech is fully protected by the Free Speech Clause as the "first principle" necessary to establish adequate protection for religious expression in the public schools); *cf.* Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 926, 931-32 (observing that religious exemptions are no longer justifiable in our current cultural environment and that those who seek meaningful protection for religious liberty ought to set about developing doctrinal approaches that would protect religious exercise not "as speech, but rather like speech"). Professor Gedicks also suggests that proper application of the fundamental rights strand of Equal Protection doctrine may provide significant protection for religious liberty and could serve as an alternative justification for the claims made by Duncan and Laycock, *supra* note 67, that underinclusive laws are presumptively unconstitutional because they fail to be neutral and generally applicable under *Smith*. Gedicks, *supra* note 67, at 117-19.

[69] Brownstein, *supra* note 47, at 144 (suggesting that the "preference for a free speech model" in cases like *Rosenberger* is probably best explained "by the utility of this approach for undermining Establishment Clause constraints on state promotion and support for religion").

[70] 515 U.S. 819 (1995).

[71] Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001); Lamb's Chapel v. Ctr Moriches Union Free Sch. Dist., 508 U.S. 384 (1993); Bowman, *supra* note 3, at 211-14 (discussing these cases).

[72] *See* Douglas Laycock, *The Underlying Unity of Separation and Neutrality*, 46 EMORY L.J. 43, 53-67 (1997) (narrating the history of Establishment Clause doctrine as one of tension between the principles of "no aid" to religion and nondiscrimination regarding religion and explain-

conservative advocacy organizations like the American Center for Law & Justice have explicitly staked their efforts to protect student religious expression on the Free Speech Clause.[73]

From the other side, secularists[74] have long focused on speech as the preferred vehicle for protecting religious liberty because of doubts about the wisdom of constitutionally compelled religious exemptions from general laws under the Free Exercise Clause.[75] From this perspective, free speech doctrine provides all the protection religious activity needs and all that it should get.

We have, then, a kind of overlapping consensus in which people with very different points of view agree that the Free Speech Clause ought to be the focus in religious liberty litigation both in the schools and elsewhere. This consensus, however, masks underlying disagreements. Unlike secularists who are skeptical of constitutional free exercise exemptions, religionists have embraced free speech protection for tactical reasons. They would emphasize that religious expression gets *at least as much* protection as the Free Speech Clause provides, but some would add that where the Free Exercise Clause can provide more protection it should be allowed to do so.[76] Exemptions skeptics, on the other hand,

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ing that *Rosenberger* forced the Court to confront this tension and to resolve it in favor of the no-aid principle.).

[73] Sekulow et al., *supra* note 37, at 1018-19. The ACLJ guidelines summarize the organization's position by stating that the proper resolution of questions about student religious expression in the public schools depends on three principles: (1) the Free Speech Clause protects religious speech (including worship), (2) the Free Speech Clause categorically forbids viewpoint-based restrictions of speech and usually requires a compelling interest to restrict speech on the basis of its content (i.e. subject matter), and (3) the First Amendment (specifically, the Establishment Clause) applies only to state and not private action. The authors add that government "must treat religious speech just as it treats any other type of speech," *id.* at 1018, but in the context the point is clearly that the Establishment Clause provides no reason for treating religious speech *worse* than secular speech. There is no statement that religious speech may not be treated more favorably than secular speech, and in one sense the complex of positions endorsed by the ACLJ here requires that kind of treatment. Viewpoint discrimination is categorically forbidden in their view, and religious speech always counts as the expression of a viewpoint. *See* Conkle, *supra* note 67, at 113-14 (explaining that in a limited sense religious speech occupies a preferred status under cases like *Rosenberger*, *Lamb's Chapel*, and *Good News Club* because religion is apparently always to be treated as a viewpoint rather than as a subject matter). For criticisms of the Court's tendency to always treat religion as a viewpoint, see Kent Greenawalt, *Viewpoints from Olympus*, 96 COLUM. L. REV. 697 (1996).

[74] The label is from Lupu & Tuttle, *supra* note 62. I discuss my reasons for using their labels in note 62 as well.

[75] *See* Marshall, *supra* note 53, at 593 ("Any judicially created exemption granted to those expressing a religious interest may be constitutionally required only when such an exemption would be similarly required for those expressing parallel free speech claims."); Steven G. Gey, *Why is Religion Special?: Reconsidering the Accommodation of Religion Under the Religion Clauses of the First Amendment*, 52 U. PITT. L. REV. 75, 181 (1990) (stating that the "[g]overnment has no free exercise obligation beyond protecting religious belief, and the verbal or symbolic expression of religious belief").

[76] *Cf.* Brownstein, *supra* note 47, at 137 (characterizing Justice Scalia's position in *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), as treating the Free Speech Clause as a "one-way

would point out that this result is highly problematic from the standpoint of free speech doctrine because treating religious speech better than analogous secular speech looks like content discrimination and perhaps even viewpoint discrimination.

These differences of opinion are real and important, but given the current anemic state of free exercise law they are masked in most situations. Where religious activity can be treated as speech, the Free Speech Clause will usually provide stronger protection than the Free Exercise Clause; and where speech doctrine fails to protect, free exercise doctrine will not be much help either. Accordingly, the question of whether religious speech should ever get more protection than analogous secular speech is usually moot. In the public school setting, however, things look different for two reasons.

C. *Student Speech Law and Hybrid Rights*

First, free speech protections are a good bit weaker inside the public schools than outside them. *Tinker*, the most protective student speech standard, allows schools to restrict student speech that merely "happens to occur on the school premises"[77] if the school can prove that the speech has been or is reasonably anticipated to be materially and substantially disruptive to the school environment or that the speech interferes with the rights of others "to be secure and to be let alone."[78] Because schools that restrict speech under the authority of *Tinker* are acting on the basis of the communicative impact of the speech

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ratchet when religious expression is at issue" because "[d]iscrimination against religious speech is prohibited, but discrimination in favor of religious speech is permissible"); Holly Coates Keehn, *Terroristic Religious Speech: Giving the Devil the Benefit of the First Amendment Free Exercise and Free Speech Clauses*, 28 SETON HALL L. REV. 1230, 1260 (1998) (stating that religious speech should receive greater protection than secular speech because secular speech is "protected by only one clause of the First Amendment" whereas "[r]eligious speech is doubly protected and as such deserves a higher level of judicial deference"). I should acknowledge, however, that my characterization of some religionists as embracing the one-way ratchet theory is open to dispute, as it is relatively uncommon to find explicit avowals – let alone defenses – of the theory. Even staunch advocates of preferential treatment for religious conduct may disavow any implication that religious speech gets special treatment. *See, e.g.*, Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 6-9, 40 (2000) (stating that equal treatment is the governing principle "when a conflict centers on the right of free speech" and that "[f]avoring religious speakers over similarly situated nonreligious speakers would violate the viewpoint-neutrality requirement of the Free Speech Clause"). I would suggest, however, that many religionists are probably sympathetic to the ratchet theory at some level in that they embrace both the view that religious activity should be protected as speech and the view that discretionary religion-specific accommodations should be treated favorably. As I explain below, these positions are in considerable tension with one another and the failure to notice this tension may suggest an implicit assumption that the characterization of religious activity as speech or conduct depends on which approach would most benefit religious claimants. *See infra* notes 161-166, 189-194 and accompanying text.

77 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

78 Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508-09 (1969).

(i.e., how others will react to the speaker's message), these speech restrictions should be understood as content-based.[79] And while the *Tinker* standard (at least as applied by some courts) has considerable bite,[80] it still falls well short of the genuinely strict scrutiny applied to content-based regulations of speech in most contexts.[81] *Fraser*, which governs "lewd," "vulgar," or "offensive" speech, also is less protective than the standards applied to analogous speech outside the schools.[82] *Hazelwood*'s principle that restrictions of school-sponsored speech must be "reasonably related to legitimate pedagogical concerns" is not a demanding one, and *Hazelwood* may be read to allow viewpoint discrimination even though this is almost categorically prohibited in general free speech law.[83] Finally, the Court's new decision in *Morse* accords no protection at all to speech that advocates illegal drug use, and does so without any of the limitations that normally apply to government restrictions of speech inciting illegal conduct.[84] Across the board, then, speech protection in the public schools is weaker than in most other contexts. If one reads *Smith* to have written the Free Exercise Clause out of the Constitution, however, it would still seem that something is better than nothing, and the question of whether the Free Exercise Clause can be read to privilege religious over secular speech would still be moot.

Here, however, the so-called "hybrid rights" exception to *Smith* comes into play.[85] As Professor Bowman notes, *every* First Amendment challenge to

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79 Geoffrey R. Stone, *Restrictions of Speech Because of its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 81-82 n.3 (1978) (citing the armband prohibition in *Tinker* as an example of a government restriction that is content-neutral on its face "but that is directed at a harm caused by the content of the speech"); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286-87 (arguing that laws are "content-based as applied" when the law's application is triggered by the content of the speech and that such laws "should be presumptively unconstitutional, just as facially content-based laws are presumptively unconstitutional").

80 *See supra* note 31 and accompanying text.

81 Stone, *supra* note 27, at 196 (noting that "in assessing the constitutionality of content-based restrictions on high value expression, the Court employs a standard that approaches absolute protection").

82 Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986). On the contrast between the treatment of vulgar, lewd, or offensive speech inside and outside the public schools, see *supra* note 18.

83 Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988). On the question of whether *Hazelwood* permits viewpoint discrimination, see generally Waldman, *supra* note 16; R. George Wright, *School-Sponsored Speech and the Surprising Case for Viewpoint-Based Regulations*, 31 S. ILL. U. L.J. 175 (2007).

84 *See supra* notes 18-28 and accompanying text.

85 Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881-82 (1990). State Religious Freedom Restoration Acts (state RFRAs) modeled after the federal Religious Freedom Restoration Act of 1993 (RFRA), codified as amended at 42 U.S.C. §§ 2000bb to 2000bb-4 (2000), *invalidated in part by* City of Boerne v. Flores, 521 U.S. 507 (1997), are another possible source of free exercise protections that might theoretically lead to better treatment for

the restriction of student religious speech carries the theoretical possibility of becoming a hybrid of free speech and free exercise rights.[86] Some of these challenges may also implicate the substantive due process right of parents to direct the upbringing of their children that is usually traced to *Pierce v. Society of Sisters*.[87] In either case, the hybrid claims might warrant strict scrutiny—at least the old, relatively gentle *Sherbert-Yoder* strict scrutiny if not the strict scrutiny that "really means what it says."[88] Still, even this more modest form of strict scrutiny will sometimes provide a more rigorous standard of review than the Supreme Court's student speech cases would provide on their own.[89] This raises

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student religious speech than analogous nonreligious speech. *See generally* Thomas C. Berg, *State Religious Freedom Statutes in Private and Public Education*, 32 U.C. DAVIS L. REV. 531 (1999). I am unaware of any cases discussing student religious speech claims under state RFRA laws, and in any event the constitutional reasons I provide for the failure of free speech hybrids in Part III E below also explain why state RFRA's should not be read to privilege religious over secular student speech. The same point also applies with respect to free exercise provisions in state constitutions that have been interpreted to provide more protection than the federal Free Exercise Clause. *See, e.g.*, State v. Miller, 549 N.W.2d 235, 240-41 (Wis. 1996) (rejecting *Smith* and retaining a "compelling interest/least restrictive alternative" test for evaluating religious liberty claims under the Wisconsin constitution). Accordingly, I will confine the bulk of my discussion to the hybrid rights doctrine.

86 Bowman, *supra* note 3, at 194-97.

87 268 U.S. 510, 534-35 (1925). The *Pierce* Court justified its recognition of this right of parental control by appealing to *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923), for the proposition that the liberty protected by the Fourteenth Amendment includes the right to "establish a home and bring up children." For ease of reference, I shall sometimes refer to the parental right to direct the upbringing of children as "the *Pierce* right." The Supreme Court recognized the *Pierce* right as one of substantive due process in *Troxel v. Granville*, 530 U.S. 57, 65-66 (2000).

88 *Smith*, 494 U.S. at 888.

89 It seems clear that *Sherbert-Yoder* scrutiny is a more exacting standard of review than *Morse* or *Fraser* would require. Under the *Morse* and *Fraser* cases, speech is essentially unprotected once a court makes the threshold determination that the restricted speech advocates illegal drug use or is lewd, vulgar, or offensive. (One doubts whether much religiously-motivated student speech would be governed by these cases in any event.) *Sherbert-Yoder* scrutiny also seems more demanding than *Hazelwood*, which courts apply in the spirit of rational basis review.

It is a closer question whether *Sherbert-Yoder* scrutiny is more demanding than *Tinker*. *Cf.* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1187-89 (9th Cir. 2006) (after ruling that anti-gay T-shirt could be restricted because it invaded the rights of others, the court assumed the existence of a hybrid right but found that the speech restriction passed *Sherbert-Yoder* scrutiny because of the lack of a substantial burden on the plaintiff's religious exercise and because the school had a compelling interest in protecting the rights of other students and in maintaining a healthy learning environment), *cert. granted, judgment vacated, case remanded with instructions to dismiss as moot*, 127 S. Ct. 1484 (2007). The answer would depend in part on whether avoiding material and substantial disruptions of the school environment and invasions of the rights of others should count as compelling interests under *Sherbert* and *Yoder*. My hunch is that many courts would agree with *Harper* that they should, but the question of how courts decide whether interests are "compelling" is mysterious enough to make any predictions hazardous. *See* Richard Fallon, *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1321-25 (2007) (canvassing problems in the Supreme Court's treatment of compelling interests and noting that the Court's approach to identifying such interests is sometimes "astonishingly casual").

the possibility that sometimes religious speech might be more protected than analogous secular speech. This could occur in a number of different ways.

To take a somewhat fanciful example drawing on Professor Bowman's T-shirt theme, imagine that a school sponsors a T-shirt design contest and declares that entries will be hung in the hallways of the school for a week, then displayed at a school assembly where a winner will be declared. Two students enter T-shirt designs featuring anti-gay messages.[90] One shirt declares that "Homosexuality is Shameful. 'Romans 1:27,'"[91] another tells students to "Be Happy, Not Gay."[92] The latter shirt also bears what appear to be symbols of a certain ideal of masculinity: perhaps a football, a hunting cap, a can of beer, and a Lazy Boy recliner. As I have imagined them, the first shirt expresses religiously-motivated disapproval of homosexuality; the second expresses adherence to a set of masculine gender norms and disapproval of gay men as violating those norms—an entirely secular viewpoint. Many schools would not wish to display these designs, and would seek to exclude them from the hallway display and the subsequent assembly. Would the religious and secular anti-gay shirts enjoy different degrees of First Amendment protection?

Viewing this question through the lens of student speech law, most courts would see the display of the T-shirt design entries in the hallway and at the assembly as school-sponsored speech governed by *Hazelwood*.[93] The ques-

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[90] Assume that the terms of the "design contest" are sufficiently broad that neither of the shirts can simply be treated as in violation of contest rules. Labels like "pro-gay" and "anti-gay" are obviously crude, and they elide various possible distinctions: e.g., between those who advocate "tolerance" for gays and lesbians and those who seek full cultural and legal equality for gays and lesbians on the pro-gay side, and between distaste for homosexual people and disapproval of homosexual conduct ("Love the sinner, hate the sin") on the anti-gay side. *But cf. Harper*, 445 F.3d at 1181 ("Perhaps our dissenting colleague believes that one can condemn homosexuality without condemning homosexuals. If so, he is wrong."). Nonetheless, the crudeness of the labels is true to the ways in which these sorts of conflicts seem to be experienced by participants in the public school culture wars, and perhaps that is reason enough to use them.

[91] This was part of the inscription on the shirt in *Harper*, 445 F.3d at 1171.

[92] This was the inscription on the shirt in *Zamecnik* ex rel. *Zamecnik v. Indian Prairie School District No. 204*, No. 07 C 1586, 2007 WL 1141597, at *2 (N.D. Ill. Apr. 17, 2007).

[93] When displayed in the hallway and (even more clearly) at the school assembly, the T-shirts could reasonably be perceived to bear the imprimatur of the school. *Cf.* Peck v Baldwinsville Cent. Sch. Dist., 462 F.3d 617, 622, 628 (2d Cir. 2005) (applying *Hazelwood* to a school's refusal to permit the display of a kindergartner's poster containing some religious words and images at a school environmental assembly); Bannon v. Sch. Dist. of Palm Beach County, 387 F.3d 1208, 1210-11, 1214 (11th Cir. 2004) (applying *Hazelwood* to dispute involving proselytizing murals painted by students on plywood panels that cordoned off areas of the school that were undergoing construction). In *Bannon*, I should note, the painted panels could have been in place for as long as four years, *id.* at 1210, and so the length of the display makes them more clearly school-sponsored than in my hypothetical.

The counterargument here would be that the school has "opened up" a limited public forum for student speech by sponsoring the contest, and that there is no real risk that anyone would regard the messages on these T-shirts as the school's messages. While the argument has some force, courts tend to read the scope of *Hazelwood* pretty broadly. If the school newspaper in *Hazelwood*

tion would then be whether restricting the shirts would be reasonably related to a legitimate pedagogical purpose. The school could plausibly say that it was excluding the shirts because it has legitimate pedagogical interests including (a) disassociating itself from messages it finds distasteful, (b) protecting gay students from disrespectful treatment, and (c) teaching participants the values of respect, civility, and tolerance. Arguments of this sort often prevail.[94] It is likely (if not inevitable), then, that the First Amendment law of student speech would allow a school to exclude both shirts from the design contest display. If we approach the same scenario through the lens of free exercise law, the secular anti-gay T-shirt design would of course get no free exercise protection. But what about the religiously motivated shirt? To the extent that both T-shirts are excluded from the contest because of their anti-gay sentiments, the rule applied by the school does not target religious speech and so presumably *Smith* would apply.

That leaves the question of hybrid rights. The religious T-shirt design clearly implicates both speech and free exercise concerns. To print a message on a T-shirt is to engage in conventional speech, and the student who designed the shirt would presumably understand himself to be offering a kind of religious

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had not been opened up as a limited forum for student journalists, I think the same result would probably be reached on the facts of my hypothetical.

[94] *Zamecnik* is illustrative. There, a student wore a "Be Happy, Not Gay" T-shirt expressing her religious conviction that homosexuality is wrongful. The court read Seventh Circuit precedent to require that the school's restriction of the shirt be evaluated under *Hazelwood* even though the T-shirt was concededly not school-sponsored speech. 2007 WL 1141597, at *9. It then reasoned that school officials could prohibit the wearing of the shirt because they "have a legitimate [pedagogical] interest in protecting gay students at [their] school from being harmed, both physically and psychologically." *Id.* at *11. *Cf.* Poling v. Murphy, 872 F.2d 757, 763 (6th Cir. 1989) (upholding school's sanctioning of student for speech mocking an assistant principal at a school assembly under *Hazelwood* because "[t]he art of stating one's views without . . . unnecessarily hurting the feelings of others surely has a legitimate place in any high school curriculum").

A counterexample is *Hansen v. Ann Arbor Public Schools,* 293 F. Supp. 2d 780 (E.D. Mich. 2003). There, a federal district court ruled that a school violated a student's free speech rights by excluding her from a "Homosexuality and Religion" panel during the school's "Diversity Week" because she wished to say that homosexuality is sinful. The court analyzed the case under *Hazelwood,* and the school proffered legitimate pedagogical concerns including "creating a safe and supportive environment for gay and lesbian students." *Id.* at 797. These were found insufficient because the court read *Hazelwood* to prohibit viewpoint discrimination and (plausibly) saw the school's conduct as a clear instance of viewpoint discrimination. *Id.* at 798-800.

Should any readers prove resistant to my analysis of this hypo, I note that for present purposes all I need is the idea that there are cases where *Hazelwood* would fail to protect student religious speech but a free speech/free exercise hybrid might tip the scales in the other direction. It should not take a great leap of faith to believe that such cases exist. Other questions raised by the hypothetical that I will largely sidestep are whether a school's exclusion of the T-shirts would constitute viewpoint discrimination and, if so, whether *Hazelwood* allows this kind of viewpoint discrimination. With respect to the first question, much depends on whether one imagines the other contest entries to include T-shirts bearing messages of support and tolerance for gays and lesbians. As noted above, *supra* note 83, there is a considerable literature on the question of whether *Hazelwood* allows viewpoint discrimination.

witness to the wrongness of homosexuality. Both speech and free exercise interests will be implicated in all cases of student religious speech, but that by itself is not enough to trigger the hybrid rights exception to *Smith*. In those circuits that recognize the exception at all, the usual trigger for a hybrid right is to ask whether the free speech claim is "colorable."[95] Though the term is at the very least vague,[96] the general idea seems to be that a claim is colorable when it is too weak to prevail but there was at least a pretty good argument that it ought to have prevailed. It is a claim that loses by a little, not by a lot. Where the speech claim is "colorable," a free speech/free exercise hybrid is formed and the resulting claim is analyzed under the *Sherbert-Yoder* brand of strict scrutiny.

Applying this standard to our hypothetical, is the speech claim regarding the religious T-shirt colorable? I would think so, for I have already noted that this claim would not be a slam dunk for the school. There are decent arguments that a limited forum has been created, and that the resulting standard of review might vindicate the claim.[97] There are also decent arguments that the possibly viewpoint-discriminatory character of the school's action could be a reason for upholding the speech claim.[98] If my analysis is correct, the exclusion of the religious T-shirt would be reviewed under *Sherbert-Yoder* strict scrutiny while the exclusion of the secular T-shirt would be reviewed under *Hazelwood*.

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[95] *See, e.g.*, Swanson v. Guthrie Indep. Sch. Dist. No. I-L, 135 F.3d 694, 700 (10th Cir. 1998). It has been said that "colorable" is a higher standard than "non-frivolous." Axson-Flynn v. Johnson, 356 F.3d 1277, 1295-96 (10th Cir. 2004).

[96] Brownstein, *supra* note 47, at 189-90, suggests that the "colorable" standard is "unintelligible" because in other legal contexts, a "colorable claim is only accepted as a basis for reaching a decision or moving forward before the claim can be fully considered on the merits." To illustrate the point, the Ninth Circuit has said that for a claim to be colorable, there must be "a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits." Miller v. Reed, 176 F.3d 1202, 1207 (9th Cir. 1999) (quoting Thomas v. Anchorage Equal Rights Comm'n., 165 F.3d 692, 703, 707 (9th Cir. 1999), *vacated en banc as unripe*, 220 F.3d 1134 (9th Cir. 2000)). Yet at the point when a court is considering hybrid rights arguments, there is *no* likelihood that the claim will succeed on its own. If it had succeeded, there would have been no need to invoke the hybrid rights doctrine.

[97] *See supra* note 93. If the school has indeed opened up a limited public forum, content-based restrictions on speech falling within the boundaries of the forum would be strictly scrutinized. *See* Warren v. Fairfax County, 196 F.3d 186, 193 (4th Cir. 1999) (stating that strict scrutiny applies "[i]f the government excludes a speaker who falls within the class to which a designated [limited] public forum is made generally available" (quoting Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677 (1998))).

[98] *See supra* note 94 (discussing *Hansen*). This actually raises a puzzle about how the colorable standard ought to be applied. It is one thing to argue, e.g., that a speech claim lost but was colorable because it was a close call under *Tinker* whether there was enough evidence of substantial and material disruption or violation of the rights of others. *Harper* ought to be seen as presenting a colorable free speech claim for this reason, though the court only assumed this for purposes of decision and seemed skeptical that the speech claim was truly colorable. Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1187-88 (9th Cir. 2006), *cert. granted, judgment vacated, case remanded with instructions to dismiss as moot*, 127 S. Ct. 1484 (2007). It is less clear whether a claim about viewpoint discrimination in a *Hazelwood* case is still colorable after the court has decided that *Hazelwood* allows viewpoint discrimination.

It is not clear that the interests invoked by the school would qualify as compelling, so there is a good chance that the religious anti-gay T-shirt design would be protected against exclusion while the secular anti-gay shirt design would not be.[99] At the very least, the restrictions of the two shirts would be treated differently by being subjected to significantly different standards of review. Either way, from a speech standpoint this looks like content discrimination in favor of religious speech. Either way, treating the T-shirt as religious exercise would add protection over and above that provided by treating it as speech.

The same dynamic could arise in other ways. Imagine two junior high students who wish to make oral class presentations explaining the basis for their opinion that "Islam is a terrorist religion." One student is motivated by her own Christian beliefs and sees the blanket denunciation of Islam as religious witness, the other operates from a more secular perspective.[100] More clearly than in the T-shirt example, courts would likely regard any restriction of the presentations as governed by *Hazelwood*, which is usually interpreted to cover all speech that is part of the curriculum whether or not it could reasonably be seen as bearing the imprimatur of the school.[101] Again, *Hazelwood* would probably allow the school to restrict these presentations on the ground that preventing inflammatory (and ill-informed) student presentations and (depending on the student population) avoiding offense to Muslim students are legitimate pedagogical concerns.[102] That is the end of the matter for the secular presentation, but the relig-

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[99] One might also wonder whether the exclusion of a shirt from a hallway display and assembly would count as a "substantial burden" in the *Sherbert-Yoder* framework. The substantial burden requirement and the difficulties of meeting it for religious speech in the schools may be another reason why the speech paradigm has flourished at the expense of free exercise protection. *See infra* notes 134-138 and accompanying text.

[100] One might question whether a denunciation of Islam could ever count as "secular speech," but I think this is unproblematic. There is no reason why a person with no religious beliefs of her own could not take a negative view of religion in general or of Islam in particular for entirely secular reasons. Denunciations of Islam are necessarily speech about religion, but they need not express a religious point of view or be religiously motivated. Here, as elsewhere, speech about religion is not the same thing as religious speech. *Cf.* Abington Sch. Dist. v. Schempp, 374 U.S. 203, 225 (1963) (striking down school prayers and Bible readings but insisting that schools may still teach about religion in an objective manner); GREENAWALT, *supra* note 16, at 80-81 (arguing that "public schools should not teach that particular religious propositions are true or false, sound or unsound" but that schools may teach about religion and "should say more about religion than they now do" even though teaching about religion "is not constitutionally required").

[101] *See supra* note 16.

[102] *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988) (stating that a school must be able to disassociate itself from speech that is "inadequately researched" or "biased or prejudiced"); *supra* note 94 (discussing decisions in *Zamecnik* and *Poling* which recognize the avoidance of offense to others as a legitimate pedagogical concern). As in all cases of this sort, it can certainly be argued that allowing students to make these kinds of inflammatory presentations and then subjecting the presentations to critical scrutiny by class and teacher would be more educationally valuable because it would better prepare the students for their participation as adults in "uninhibited, robust, and wide-open" public discussion. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). Rightly or wrongly, *Hazelwood* treats the question of how to handle these sorts

iously motivated presentation might receive greater protection via a free speech/free exercise hybrid.[103]

Or, to give a third example, consider school uniform policies and dress codes. These have been routinely upheld by courts[104] even on the understanding that a student's choice of attire counts as symbolic speech.[105] If a student's choice of clothing is symbolic speech, the school's uniform policy is evaluated under the relatively lenient scrutiny of *United States v. O'Brien*[106] and upheld.[107] But what of the student who has religious reasons for not wishing to wear school uniforms? This might in theory give rise to a free speech/free exercise hybrid that would entitle the religious objector to a more stringent standard of review than the secular student.[108]

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of situations as a strategic choice to be made by teachers and other school officials rather than as a constitutional mandate.

[103] The speech argument in this hypothetical case strikes me as weaker than in the previous example, and so as less likely to be found "colorable." And, again, the question of substantial burden would raise difficulties. Nevertheless, the prospect that restrictions on two instances of conventional speech conveying essentially the same message might be subjected to different standards of review and perhaps even different treatment simply because of the religious or secular motivation of the speech is troublesome.

[104] *See, e.g.*, Blau v. Fort Thomas Pub. Sch. Dist., 401 F.3d 381 (6th Cir. 2005) (upholding school dress code against free speech and other challenges); Littlefield v. Forney Indep. Sch. Dist., 268 F.3d 275 (5th Cir. 2001) (same).

[105] *See, e.g., Blau*, 401 F.3d at 389-91 (provisionally treating student clothing choices as speech for purposes of overbreadth challenge but deciding that plaintiff's desire to wear clothes that "'look[] nice on [her]'and that 'she feel[s] good in'" did not convey a sufficiently particularized message to count as speech); *Littlefield*, 268 F.3d at 285-86 (assuming without deciding that student choices about clothing qualify as speech for First Amendment purposes).

[106] 391 U.S. 367 (1968). The *O'Brien* test applies in situations where "speech" and "nonspeech" elements are present in the same conduct, and indicates that the government's interest in regulating the nonspeech elements justifies incidental burdens on speech where the regulation satisfies four requirements. The regulation must (1) be "within the constitutional power of the Government" and (2) must "further[] an important or substantial governmental interest." This interest must be (3) "unrelated to the suppression of free expression," and (4) the incidental burdens on speech must not be greater than is "essential to the furtherance of that interest." *Id.* at 377.

[107] *See, e.g., Blau*, 401 F.3d at 391-92; *Littlefield*, 268 F.3d at 286.

[108] The speech claim here is pretty weak in my view, and probably not "colorable." A federal district court in North Carolina confronted a religious challenge to a school uniform policy similar to the one I have imagined. In *Hicks ex rel. Hicks v. Halifax County Board of Education*, 93 F. Supp. 2d 649 (E.D.N.C. 1999), a student's great-grandmother and legal custodian objected to a school uniform policy on the ground that it encouraged the kind of conformity that would ill prepare her grandson to stand apart from the anti-Christ during the "last days." *Id.* at 653. The court ruled that the uniform policy was neutral and generally applicable under *Smith*, *id.* at 656, and (though the issue was apparently not raised) the policy would also have easily passed muster under *O'Brien*. Accordingly, the plaintiff relied on hybrid rights arguments. Interestingly, the court rejected (without explanation) the argument for a free speech/free exercise hybrid, *id.* at 657-58 n.4, but held that the argument for a *Yoder*-type hybrid of free exercise rights and the parental right to control a child's upbringing was sufficient to withstand summary judgment. The court's reasoning about the latter hybrid is unclear and (to my mind) unpersuasive; it did not con-

These examples are sufficient, I hope, to show that the combination of the hybrid rights doctrine and the weakened speech protection in the public school context creates the possibility that religious student speech will receive greater constitutional protection than secular student speech precisely because such speech is the exercise of religion as well as speech. This situation, I suggest, gives rise to a small puzzle. We might put it this way: Given the relative weakness of free speech protection in the school context and the nearly universal availability of hybrid rights arguments in that context, *why* is it still the case that the Free Speech Clause rather than the Free Exercise Clause does the "heavy lifting" work in protecting student religious expression (as Professor Bowman and I both agree that it does)?

In fact, the free speech/free exercise hybrid argument (along with hybrid rights arguments generally)[109] seems to be making little headway in the courts.

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sider whether a parental rights claim would be "colorable," but instead seemed to reason that this *must* be a hybrid rights case because the complex of rights at issue was the same as in *Yoder* and the plaintiffs had presented a "genuine claim of infringement of a constitutional interest identified in *Smith's* hybrid-rights passage" which was "more than a mere allegation." *Id.* at 662. In any event, the religious character of the plaintiff's objection to the uniform policy ultimately entitled the plaintiff to greater constitutional protection than analogous secular plaintiffs because the court decided to apply *Sherbert-Yoder* strict scrutiny, a more demanding standard than the intermediate scrutiny of *O'Brien*. *See* Stone, *supra* note 42, at 48-52 (arguing that the wording of *O'Brien* might suggest a rigorous test but that the test is actually indistinguishable from no scrutiny or minimal scrutiny). To the extent we think of the choice of clothing as a kind of symbolic speech, this again seems to allow preferential treatment of religious speech in ways that are hard to square with the general principle that the government may not discriminate on the basis of speech's content. Admittedly, this sort of preference seems less troubling here than with respect to more conventional speech activities because the mere desire to wear, say, green cargo pants when the school requires tan or blue khakis does not have much expressive content. But if we imagine students who object to the uniform policy because they want to wear shirts adorned with textual messages, we are back in the realm of conventional expression and the idea that religious speech might get better treatment seems more clearly problematic.

[109] *See generally* Steven H. Aden & Lee J. Strang, *When a "Rule" Doesn't Rule: The Failure of the* Oregon Employment Division v. Smith *"Hybrid Rights Exception,"* 108 PENN ST. L. REV. 573, 574 (2003) (concluding that "hybrid rights claims have overwhelmingly failed to succeed"). As of 2003, Aden and Strang identified only five cases where a hybrid rights argument had prevailed. *Id.* at 595-98. Commentators may count "wins" in this context in different ways. Aden and Strang appear to include as "wins" cases where the court entered a final judgment for the plaintiffs, granted a preliminary injunction, or at least denied a defense motion for summary judgment. Yet even in some of the cases they identify as hybrid rights "wins," the court's hybrid-rights reasoning was superfluous because the case had already been decided on other grounds and hence the hybrid rights argument did no independent work. *See infra* note 111 (discussing two cases that followed this pattern); *see also* William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211, 242-43 (1998) (concluding—a bit too strongly, in my view—that "when a court allows a hybrid to 'win' by applying strict scrutiny to the claim, it never does so as the primary basis for the decision"). Another ambiguity in this area is that some commentators—as in the Esser passage just quoted—appear to identify a hybrid-rights "win" if the plaintiff convinces the court to apply heightened scrutiny regardless of the ultimate disposition of the claim. Regardless of the details of how hybrid "wins" are counted, Aden's and Strang's general conclusion that hybrid rights claims usually lose seems uncontroversial.

Plaintiffs sometimes fail even to raise it,[110] and when they do so it often fails.[111] When it does succeed, the hybrid rights argument often turns out to be unneces-

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[110] *See* Bowman, *supra* note 3, at 196 n.31.

[111] *See, e.g.*, Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67 (2004) (rejecting free speech hybrid because the speech claim was meritless where a church-affiliated employer challenged state law requiring employers who provided health insurance for their employees to include coverage for prescription contraceptives); Littlefield v. Forney Indep. Sch. Dist., 108 F. Supp. 2d 681, 706 n.10 (N.D. Tex. 2000) (rejecting free speech hybrid challenge to school uniform policy on the ground that uniform policy did not implicate speech interests), *aff'd*, 268 F.3d 275 (5th Cir. 2001). The plaintiffs in *Littlefield* abandoned their hybrid rights argument on appeal. *Littlefield*, 268 F.3d at 293 n.27.

In fairness, I should note that the "success rate" for hybrid claims in the public schools has actually been higher than in other contexts. Perhaps this is not surprising since *Yoder* was a case about schooling and thus its explicit preservation in the wake of *Smith* may give hybrid rights arguments somewhat greater legitimacy in the schools than elsewhere. *Cf.* Peterson v. Minidoka County Sch. Dist. No. 331, 118 F.3d 1351, 1356-57 (9th Cir. 1997) (where principal was reassigned to teaching position after saying he was considering homeschooling his kids for religious reasons, Judge Noonan's lead opinion applied strict scrutiny to a free exercise claim on the basis of close analogy to *Yoder* without bothering to mention *Smith* or the idea of hybrid rights).

At least three federal district courts have relied on hybrid rights reasoning to rule in favor of students challenging public school regulations governing student dress and grooming, and in addition a state court has relied on hybrid rights to uphold a religious homeschooler's challenge to a state teacher certification requirement. These cases make up four of the five hybrid rights cases identified as winners by Aden and Strang, *supra* note 109, at 595-98. Two of these decisions involve free speech hybrid claims.

In *Alabama and Coushatta Tribes of Texas v. Trustees of the Big Sandy Independent School District*, 817 F. Supp. 1319 (E.D. Tex. 1993), *remanded per curiam for reconsideration in light of RFRA by* 20 F.3d 469 (5th Cir. 1994), the court granted a preliminary injunction that prevented the school's enforcement of a policy limiting the hair length of male students against Native American students who believed that wearing their hair long had spiritual significance. The court ruled in favor of the students on their free exercise claim after applying strict scrutiny because they had "alleged a hybrid claim of free exercise, free speech, due process [i.e. the *Pierce* right], and equal protection rights." *Id.* at 1332. Yet because the court also concluded (implausibly, in my view) that the students were likely to succeed on their independent free speech and *Pierce* claims, *id.* at 1333-34, the hybrid rights portion of the opinion was not strictly necessary to the result. In any event, the court's analysis was extraordinarily sympathetic to the plaintiffs and is questionable at many points. On the speech claim, for example, the court made no serious inquiry into whether long hair could qualify as speech under *Spence*, and it then evaluated the restriction of this "speech" under *Tinker* without considering whether *O'Brien* might have been the more appropriate standard. *Id.* at 1333-34. It is difficult to see this decision as based on anything other than hostility to *Smith*, which is manifest in the opinion. *See id.* at 1330-32. That hostility is understandable in light of the facts of the case, for the school's interests in the hair length policy seem relatively trivial and one is left with the sense that its intransigence must reflect an unappealing lack of empathy with the students' religiosity. *Cf.* EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 49, at 89 (suggesting that failure to accommodate religious practices signals an unconstitutional failure of equal regard when it can be said that government officials would have offered an accommodation if "the officials had anticipated the impact of the regulations on the life plans of these claimants and . . . they were disposed to treat the religious commandments of unfamiliar faiths as giving rise to deep and worthy personal commitments"). On that basis, I can see why some applaud the *Coushatta* decision, *see* Duncan, *supra* note 67, at 858-59, but I do not think it can be squared with *Smith*.

sary to the decision.[112] Why isn't the free speech/free exercise hybrid doing more work in general, and in student religious speech cases in particular?

In *Chalifoux v. New Caney Independent School District*, 976 F. Supp. 659 (S.D. Tex. 1997), the court recognized a free speech/free exercise hybrid right where students wished to wear rosary necklaces on the outsides of their shirts as a symbol of their Catholic faith. The school had restricted wearing of the rosaries because it had information that they were sometimes used as symbols of gang identification. Though this decision is better reasoned than *Coushatta*, its hybrid rights analysis is also unnecessary to the decision because the court found the students' free speech claim to be viable on its own. *Id.* at 667.

Needless to say, then, I agree with Professor Bowman that *Coushatta* and *Chalifoux* are "outliers" and that the cases do not portend great future success for hybrid rights arguments. Bowman, *supra* note 3, at 196 n.31. I would also emphasize that because each case rules that the religious activity was protected on grounds of the Free Speech Clause alone, these are not cases where religious "speech" was privileged by virtue of its religious character. The next two cases involve only the *Pierce* parental rights/free exercise hybrid.

In *Hicks*, already discussed *supra* at note 108, a federal district court ruled in favor of a religious challenge to a school uniform policy by relying on a *Pierce* hybrid, but the court's reasoning was sketchy. Specifically, the court failed to seriously address the question of whether a stand-alone *Pierce* challenge to the policy would have had any force. A court that asked whether this claim was colorable would likely have concluded that it was not and would therefore have rejected the hybrid argument, for stand-alone *Pierce* challenges are typically subjected only to rational basis review. *See, e.g.*, Herndon v. Chapel Hill-Carrboro City Bd. of Educ., 89 F.3d 174, 179 (4th Cir. 1996) (applying rational basis review to a claim that school's community service requirement violated the *Pierce* right).

The fourth case, *People v. DeJonge*, 501 N.W.2d 127 (Mich. 1993), may be the clearest example of a decision where the hybrid rights exception was critical to the outcome. There, parents who homeschooled their children for religious reasons argued that a state law requiring certification for all teachers in approved nonpublic schools (including home schools) violated the Free Exercise Clause as applied to them. The court agreed, applying strict scrutiny after finding that the case involved a hybrid of free exercise and the *Pierce* right. Yet, strikingly, on the same day the court rejected a stand-alone *Pierce* challenge brought against the certification requirement by secular homeschoolers. People v. Bennett, 501 N.W.2d 106 (Mich. 1993). The court applied rational basis scrutiny to the *Pierce* claim on its own, but strict scrutiny to the hybrid free exercise claim. *DeJonge*, then, is clearly a case where two losing claims combined to form a winner. As with *Hicks*, however, the court did not ask the question of why this losing *Pierce* claim sufficed to create a hybrid, and I doubt whether a claim that a teacher certification requirement is without a rational basis—is not even "rationally related to a legitimate state interest"—should count as colorable. *But see Bennett*, 501 N.W.2d at 126 (Riley, J., concurring in part and dissenting in part) (arguing that the certification requirement was unconstitutional even under rational basis review). The *DeJonge* court's only support for its decision to apply the hybrid rights exception was to quote the passage from *Smith* preserving *Yoder*. *DeJonge*, 501 N.W.2d at 134-35 (quoting *Smith*, 494 U.S. at 881). This apparently implies either (a) that the court thought all attempts to invoke *Pierce* and the Free Exercise Clause will generate strict scrutiny or (b) that the case was so closely analogous to *Yoder* as to be indistinguishable. Either assumption is questionable.

[112] Esser, *supra* note 109, at 228 (concluding as of 1998 that in every published decision involving a successful free speech hybrid claim, the "free speech claim had a sufficient life of its own to warrant analysis based upon a compelling interest standard (and even to possibly win an exemption)"). I am not aware of any case in which a court has clearly treated a free speech/free exercise hybrid as the sole basis for its decision. *But see infra* notes 156-160 and accompanying text (discussing a possible counterexample).

D. *Why Hybrid Claims Usually Fail*

There are a number of reasons for this, I think, and many are well known. Some apply to the hybrid rights doctrine generally, but I want to place more emphasis here on reasons that are specific to the free speech hybrid. It is this particular hybrid, of course, that bears directly on my claim that religious speech is just speech for constitutional purposes.

To begin with the general points, the first and most obvious reason for the poor track record of hybrid rights claims is that courts are understandably resistant to an idea that may well be incoherent[113] and that seems most readily explainable as an ad hoc strategy for preserving precedents inconsistent with the *Smith* rule.[114] Both these points have been made forcefully and repeatedly many times, and I will not repeat the arguments here. These arguments have led two

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[113] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 567 (1993) (Souter, J., concurring in part and concurring in the judgment) (arguing that the hybrid rights exception is "ultimately untenable"); Stanley Ingber, *Judging Without Judgment: Constitutional Irrelevancies and the Demise of Dialogue*, 46 RUTGERS L. REV. 1473, 1630 (1994) (stating that "no explanation is given why two rights, each of which . . . independently cannot justify an exemption, somehow become empowered by their coupling"); Esser, *supra* note 109, at 219 (suggesting that the logic of the hybrid rights exception is "two losers equals one winner").

It has been suggested that some of the typical criticisms of the hybrid rights doctrine are unfair, and that the doctrine does not require courts to add separate losing claims to make a winner (or at least a possible winner). Michael E. Lechliter, Note, *The Free Exercise of Religion and Public Schools: The Implications of Hybrid Rights on the Religious Upbringing of Children*, 103 MICH. L. REV. 2209, 2220-22 (2005). Lechliter contends that we should think of the hybrid rights doctrine as built on the recognition that constitutional protection ought to be stronger where multiple constitutional interests overlap, and suggests that the image of a "constitutional Venn diagram allows one to visualize a more powerful First Amendment free exercise case when the sphere is interconnected with parental rights." *Id.* at 2221.

The imagery invoked in this analysis is more charitable than the mathematical analogy (loser + loser = winner) set out above and perhaps even helpful, but at the end of they day I find it hard to see how courts can completely avoid some sort of inquiry into whether the claim to be added to free exercise is "colorable." Even if we use the Venn diagram image and think in terms of spheres of overlapping constitutional interests, the problem remains that if any degree of overlap is enough, the hybrid rights exception swallows the *Smith* rule. But if we look for "substantial overlap," we are apparently asking how close the add-on right comes to the core of its particular sphere of constitutional protection; and this, to my mind, is just another way of asking how much force a claim based on that right would carry on its own. This is what the "colorable" inquiry, vague as it is, seeks to determine.

[114] Kent Greenawalt, *Quo Vadis: The Status and Prospects of "Tests" Under the Religion Clauses*, 1995 SUP. CT. REV. 323, 335 (stating that most scholars assume the hybrid rights exception in *Smith* was "a make-weight to 'explain' *Yoder*"); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 9 (1990) (stating that the various "exceptions" to *Smith* including the hybrid rights exception involve distorted readings of precedent and that "the distortions are inexplicable unless someone in the majority wishes to preserve these precedents"); Michael McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109, 1121 (1990) (suggesting that the *Smith* Court created the notion of hybrid claims "for the sole purpose of distinguishing *Yoder*").

circuits to refuse to recognize the hybrid rights exception[115] and two more to render it meaningless by requiring that the additional claim be independently viable.[116]

A second reason is that even when the hybrid rights doctrine is taken seriously, it is difficult to meet all the conditions for a successful, outcome-determinative hybrid rights claim. Courts that take the doctrine seriously most commonly require that the claim to be added to free exercise be "colorable."[117] A claim that is too weak will not trigger strict scrutiny under the hybrid rights doctrine, but a claim that is too strong becomes independently viable and thus succeeds on its own merits without any help from its free exercise partner. This window of "close, but no cigar" claims seems to be fairly small. Where hybrid claims "succeed," often the add-on claim is found to justify relief by itself and the actual hybrid is just window dressing.[118] At the other end of the spectrum, courts regularly reject hybrid rights arguments on the ground that the add-on claim was too weak to create a hybrid deserving of strict scrutiny.[119] And even once a claim has been found colorable, the *Sherbert-Yoder* brand of strict scrutiny hardly guarantees a plaintiff's victory. Claims can fail because plaintiffs are unable to prove that their religious practices have been substantially burdened.[120] In addition, courts have long been more willing to find a compelling interest and narrowly tailored means in religious exemption cases than in other

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[115] Leebaert v. Harrington, 332 F.3d 134, 144 (2d Cir. 2003); Kissinger v. Bd. of Trs. of the Ohio State Univ., Coll. of Veterinary Med., 5 F.3d 177, 180 (6th Cir. 1993).

[116] Henderson v. Kennedy, 253 F.3d 12, 19 (D.C. Cir. 2001); Brown v. Hot, Sexy & Safer Prods., Inc., 68 F.3d 525, 539 (1st Cir. 1995). I say the approach of the First and D.C. Circuits renders the exception meaningless because if the claim to be hybridized must be strong enough to succeed on its own, the hybrid is doing no work.

[117] As noted above, there are decisions where the hybrid rights exception appears to do real work yet is applied without serious attention to the strength of the add-on right. *See supra* note 111 (discussing *Hicks* and *DeJonge*). When courts run headlong towards hybrid rights in this manner, they signal not their commitment to the hybrid rights doctrine as law but their seriousness in evading (what they regard as) the pernicious effects of *Smith*.

[118] As noted above, *see supra* note 112, courts will sometimes recognize a valid hybrid claim in addition to holding that, e.g., a speech claim is viable on its own. In such cases, the hybrid rights argument does no work and the real source of constitutional protection is solely in the Free Speech Clause.

[119] Aden & Strang, *supra* note 109, at 598-93, 594 n.194 (discussing and listing cases where hybrid rights arguments were rejected, nearly always because the add-on claim was too weak).

[120] *See, e.g.*, Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1188 (9th Cir. 2006) (rejecting free speech/free exercise hybrid partly on the ground that school's prohibition of anti-gay T-shirt was not a substantial burden on the student's religious exercise), *cert. granted, judgment vacated, case remanded with instructions to dismiss as moot*, 127 S. Ct. 1484 (2007); Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 928-29 (Cal. 1996) (plurality opinion) (concluding—implausibly, in my view—that laws against marital status discrimination impose no substantial burden on landlords whose religious convictions preclude renting to unmarried couples because the landlords could simply choose another line of business). For the leading discussion of the substantial burden inquiry, see Ira C. Lupu, *Where Rights Begin: The Problem of Burdens on the Free Exercise of Religion*, 102 HARV. L. REV. 933 (1989).

contexts.[121] This has not changed when strict scrutiny is applied to hybrid rights.[122]

The general points made so far about the failings of hybrid rights arguments are familiar enough. I now want to emphasize some difficulties that are distinctive to free speech hybrids and that are perhaps a little less familiar.

First, I think the idea of a free speech hybrid is less textually motivated than, e.g., hybrids based on the *Pierce* right. This may seem an odd claim, since *Smith* explicitly mentions freedom of speech and press, parental rights to direct the upbringing of children, and freedom of association as examples of rights which might act in conjunction with free exercise rights to require a religious exemption from neutral and generally applicable laws.[123] What I mean is this: The hybrid rights doctrine, such as it is, is born of an attempt to square the holding and reasoning of *Smith* with the fact that *Smith* did not overrule certain earlier cases that at least *seemed* to grant religious exemptions from neutral and generally applicable laws. Courts that apply the doctrine do so because they need to have some kind of explanation of why these cases are still good law. From that perspective, *Yoder* is the most "textually motivated" hybrid case because its survival cannot be explained in any other way. It cannot be a straight free exercise case because that would make it plainly inconsistent with *Smith*. The compulsory education law in *Yoder* was as "neutral and generally applicable" as a law can be,[124] and *Smith* is quite clear in saying that the Court had

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[121] EISGRUBER & SAGER, RELIGIOUS FREEDOM, *supra* note 49, at 12-13, 39-45, suggest that the watered-down strict scrutiny applied by the Court under *Sherbert* and *Yoder* was an implicit recognition that applying genuine strict scrutiny to religious exemption claims would be "wildly impractical." *Id.* at 41. For an interesting argument that the state must necessarily value its own interests over those of religious objectors, see Scott C. Idleman, *Why the State Must Subordinate Religion*, *in* LAW & RELIGION: A CRITICAL ANTHOLOGY 175 (Stephen M. Feldman ed., 2000).

[122] *See, e.g.*, *Harper*, 445 F.3d at 1189 (stating that plaintiff's claim failed not only because of lack of substantial burden, but also because "the School has a compelling interest in providing a proper educational environment for its students and because its actions were narrowly tailored to achieve that end"); Triplett v. Livingston County Bd. of Educ., 967 S.W.2d 25, 32-33 (Ky. Ct. App. 1997) (assuming the existence of a *Pierce*/free exercise hybrid but ruling that state had compelling interest in improving the education system that justified the requirement that all students take an assessment test). Aden and Strang suggest that the most likely cause for the lukewarm reception given to hybrid rights arguments may be "the courts' deeply ingrained reticence to grant exemptions based on religious claims" rather than "any inherent deficiency in the hybrid rights doctrine itself." Aden & Strang, *supra* note 109, at 602-03.

[123] Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 881-82 (1990).

[124] Wisconsin v. Yoder, 406 U.S. 205, 207 & n.2, 220 (1972). I note, however, that the compulsory education law at issue in *Yoder* did include an exception for any child "exempted for good cause by the school board of the district in which the child resides." *Id.* at 207 n.2. Some might read this as suggesting that *Yoder* could be explained on the ground that it created a "system of individualized exemptions." *Cf.* Duncan, *supra* note 66, at 1186 (arguing that the reading of *Sherbert v. Verner* in the *Smith* opinion creates a categorical rule that *Smith* does not apply "when government adopts an individualized process for allocating governmental burdens or benefits"). After all, it could be said that the law allowed some local school officials to field exemption claims and to decide that the Yoder family's religious reasons were not a "good cause" for exemption, just as the unemployment officials in *Sherbert* had to make a similar determination about

never granted an exemption from such a law solely on the basis of free exercise interests.[125] Nor can *Yoder* be a straight *Pierce* parental rights case. For one thing, the emphasis on the religiosity of the Amish is so pervasive in the opinion that it is difficult to regard it as superfluous.[126] In addition, the *Pierce* right alone could not plausibly be read to require the level of scrutiny displayed in the *Yoder* opinion.[127] Courts review stand-alone, substantive due process *Pierce* challenges to school laws under a rational basis test,[128] and surely the application of Wisconsin's compulsory education law to the Amish could not be seen as failing that test. This leaves the options of either seeing *Yoder* as resting on a combination of *Pierce* and free exercise rights or seeing it as implicitly overruled by a Court that lacked the intellectual integrity to do so openly. Commentators no doubt feel somewhat freer to reach the second conclusion than judges,[129] and so it is not surprising that many courts attempt to apply the hybrid rights doctrine and that they may do so more readily in cases analogous to *Yoder* than elsewhere.[130] In contrast, I believe the situation is much different with the Jehovah's Witnesses cases[131] cited in *Smith* as examples of free speech/free exercise hybrids. Those cases can readily be interpreted as turning entirely on free

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Adell Sherbert's reasons for not accepting new employment. For my purposes here, it is enough to point out that the *Smith* Court regarded the law in *Yoder* as neutral and generally applicable. *Smith*, 494 U.S. at 881. The existence of a good cause exception in *Yoder's* compulsory education statute may raise questions about whether the "system of individualized exemptions" exception to *Smith* can really be extended outside the unemployment compensation context, but those questions are best left to another day.

125 *Smith*, 494 U.S. at 878-79, 881.

126 *See, e.g., Yoder*, 406 U.S. at 210 ("Broadly speaking, the Old Order Amish religion pervades and determines the entire mode of life of its adherents.").

127 The Supreme Court has not clearly defined the standard of review for claims involving the right of parents to direct the upbringing of their children. Justice Thomas suggested strict scrutiny as the proper standard in *Troxel v. Granville*, 530 U.S. 57, 80 (2000) (Thomas, J., concurring in the judgment), but he wrote only for himself.

128 *See supra* note 111 (making this point in the course of discussing *Hicks ex rel. Hicks v. Halifax County Board of Education*, 93 F. Supp. 2d 649 (E.D.N.C. 1999)).

129 *See, e.g.*, William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308, 309 (1991) (stating that the *Smith* opinion "exhibits only a shallow understanding of free exercise jurisprudence and its use of precedent borders on fiction"). It is remarkable, however, that the Second and Sixth Circuits have refused to take the hybrid rights doctrine seriously even though without it the Court's treatment of *Yoder* can only be seen as confused or dishonest. *See supra* note 115 and accompanying text.

130 *See supra* note 111 (discussing *Peterson* and *DeJonge* as cases where the court applied strict scrutiny on the basis of an assertedly close analogy to *Yoder*); *cf. also* Lechliter, *supra* note 113, at 2237-40 (arguing that courts should be more aggressive in enforcing the *Pierce*-free exercise hybrid). *But cf.* Kyle Still, Comment, Smith*'s Hybrid Rights Doctrine and the* Pierce *Right: An Unintelligent Design*, 85 N.C. L. REV. 385, 421 (2006) (stating that the hybrid rights doctrine "makes little sense on a general scale" and that the *Pierce* hybrid "makes even less sense").

131 Follett v. Town of McCormick, S.C., 321 U.S. 573 (1944); Murdock v. Pennsylvania, 319 U.S. 105 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940).

speech considerations,[132] and the results can certainly be justified solely on speech grounds under current doctrines. They do not need to be seen as true hybrids in the way that *Yoder* does, and this provides some reason why courts should be especially skeptical of free speech hybrid claims.[133]

A second reason why speech hybrids may be particularly unlikely to succeed is that it may sometimes be especially difficult for plaintiffs to prove a substantial burden on their religious practice in religious speech cases. Here I draw on an analysis by Geoffrey Stone, who observed (prior to *Smith*) that the Supreme Court sometimes granted constitutional exemptions from laws that incidentally burdened First Amendment rights under the Free Exercise Clause but almost never granted exemptions under the Free Speech Clause.[134] Stone argued that this was a function of differences in the ways the Court conceived the free speech and free exercise rights. According to Stone, the Court conceived (and, I think, still conceives) of free speech rights in a way that "focuses primarily on the right to communicate effectively rather than on the right to choose any particular means of communication."[135] Because laws that incidentally burden free expression usually leave open lots of alternative means of communication, there is rarely a need for compelled exemptions from such laws. Incidental burdens on religion are a different matter, as Stone explained:

> The Court views the choice [of a particular means of communication] in the speech context as one made independently by the speaker. It is a tactical and strategic preference. The Court views the decision in the religion context differently. It is made not as a matter of preference, but as a matter of duty to higher authority. If government requires Amish parents to send their children to school, it is not frustrating a mere tactical or strate-

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[132] *See* Marshall, *supra* note 53, at 562-65 ("[O]ne may say fairly that the Jehovah's Witnesses cases established a wall of protection for the dissemination of ideas, of which religious ideas were just one variety."). *But cf.* Rodney A. Smolla, *The Free Exercise of Religion After the Fall: The Case for Intermediate Scrutiny*, 39 WM. & MARY L. REV. 925, 931-32 (1998) (suggesting that *Cantwell* is a "tougher sell" because its language focused on free exercise interests even though the decision could have been rested solely on speech grounds). The argument that the Jehovah's Witnesses cases are speech cases received a mild boost from *Watchtower Bible and Tract Society of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150 (2002), where a nearly unanimous Supreme Court ruled for Jehovah's Witnesses solely on free speech grounds in their challenge to an ordinance that restricted door-to-door canvassing and pamphleteering.

[133] Free speech hybrids do not appear to have influenced case outcomes, *see supra* note 112, but it is of course difficult to say whether the line of thought presented in the text is partly responsible for these results.

[134] Geoffrey R. Stone, *Constitutionally Compelled Exemptions and the Free Exercise Clause*, 27 WM. & MARY L. REV. 985, 988 (1986).

[135] *Id.* at 991. It may seem odd to draw upon a pre-*Smith* article explaining the greater prevalence of constitutional exemptions under free exercise law than under free speech law, but once courts decide that the hybrid rights exception has been triggered, they proceed under *Sherbert-Yoder* scrutiny by asking whether the incidental burdens on religious activity are substantial.

> gic preference, but compelling conduct that is incompatible with religious duty.[136]

There is certainly something to this observation. One could hardly have said to the plaintiffs in *Smith* that the criminalization of peyote left them "ample alternative means of religious expression," for the heart of their claims was that the ingestion of peyote was a non-fungible and fundamental element of their religious practice.[137] And where there are few if any alternative means of expression, it stands to reason that burdens are more likely to be substantial. Stone's analysis would suggest that to the extent religious speech approximates conventional nonreligious speech, alternative means of expression will exist and burdens are less likely to be substantial. At the very least, the point seems pertinent in the cases involving controversial religious T-shirts discussed by Professor Bowman. Even if witness to the wrongness of homosexuality or abortion is a religious obligation, questions about how, when, and where to do this look to be as much matters of tactics and strategy for this sort of religious speech as for analogous secular speech. Where that is so, proving that the restrictions substantially burden religious freedom probably will not be and should not be easy.[138]

E. Why Free Speech Hybrids Necessarily Fail

So far I have discussed several reasons why hybrid rights arguments in general, and free speech hybrid arguments in particular, are likely to fail. All I have said so far is consistent with the claim that the Free Speech Clause is the workhorse in protecting student religious speech simply because the Free Exercise Clause (both independently and in hybrid contexts) is so weak. I believe, however, that there are also reasons why the Free Speech Clause must be the workhorse, reasons why this would be true even if the Free Exercise Clause

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136 *Id.* at 993.

137 This did not matter to the *Smith* majority, of course, because it reasoned that incidental burdens on religious exercise simply do not count. If they had counted, the plaintiffs in *Smith* surely would have been able to establish a substantial burden on their religious practice. *See* Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 903 (1990) (O'Connor, J., concurring in the judgment).

138 *See* Harper v. Poway Unified Sch. Dist., 445 F.3d 1166, 1188 (9th Cir. 2006) (concluding that student wishing to wear a T-shirt expressing religious condemnation of homosexuality failed to show substantial burden because he "remain[ed] free to express his views, whatever their merits, on other occasions and in other places"), *cert. granted, judgment vacated, case remanded with instructions to dismiss as moot*, 127 S. Ct. 1484 (2007); Harless v. Darr, 937 F. Supp. 1339, 1346-47 (S.D. Ind. 1996) (holding that even if evangelism was an "integral part" of a student's faith, the school's limitation of the student's distribution of religious literature to particular times and places was not a substantial burden under the Free Exercise Clause or RFRA because the student remained "free to distribute tracts on the school premises at designated times and off the school premises at any time").

were much stronger than it currently is. These are reasons why student religious speech should only be protected as speech and not as the exercise of religion.

The essential point, emphasized most extensively by Alan Brownstein[139] but also by others,[140] is that treating religious speech more favorably than other kinds of speech looks like impermissible content- or even viewpoint-based discrimination.[141] The Supreme Court has clearly and repeatedly said that religious speech should be treated no worse than non-religious speech,[142] and has also said (if less clearly) that it should be treated no better.[143] Brownstein has argued extensively, and to my mind persuasively, that the best reading of *Heffron*,[144] *Widmar*, and *Texas Monthly*[145] requires the conclusion that the law may neither denigrate nor privilege religious speech in relation to other speech.[146] This means, for example, that state RFRA's should not be read to require that religious speech be exempted from otherwise valid, content-neutral speech regulations.[147] To protect a religiously motivated picketer but not a secular one from the effect of a content-neutral ordinance, or even to apply different standards of review, would be impermissible content discrimination under the Free Speech Clause.

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139 Brownstein, *supra* note 47, at 130-38, 164-68; Brownstein, *supra* note 50, at 612-25.

140 *See, e.g.*, Marshall, *supra* note 129, at 312-13 (suggesting that providing free exercise exemptions for literature distribution by religious groups but allowing state to restrict literature distribution by secular groups would "offend[] the central Speech Clause principle of content neutrality"); Thomas C. Berg, *Religious Speech in the Workplace: Harassment or Protected Speech?*, 22 HARV. J.L. & PUB. POL'Y 959, 980-82 & n.73 (1999) (stating that when religious activity takes the form of speech, the Free Speech Clause's requirement of content-neutrality should arguably control, but cautioning that this requirement should apply only to "pure religious speech, like verbal statements or the distribution of literature").

141 The latter characterization is perhaps the more likely one in light of the Supreme Court's insistence on treating religion as a "viewpoint" rather than a "subject matter" in *Rosenberger*, *Lamb's Chapel*, and *Good News Club*. *See* Rosenberger v. Rector and Visitors of Univ. of Va., 515 U.S. 819, 843 (1995); Good News Club v. Milford Cent. Sch., 533 U.S. 98, 120 (2001); Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384, 394 (1993).

142 Capitol Square Review and Advisory Bd. v. Pinette, 515 U.S. 753, 760 (1995) (plurality opinion) ("Our precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression."); Widmar v. Vincent, 454 U.S. 263, 269-70 (1981) (holding that exclusion of students wishing to "engage in religious worship and discussion" from university buildings was a content-based restriction on speech that could only be justified by strict scrutiny).

143 *See supra* note 50 and accompanying text. Professor Volokh agrees that discrimination in favor of religious speech should be unconstitutional, but remarks that at present the "constitutionality under the Free Speech Clause of preferential treatment for religiously motivated speech . . . seems unresolved." Volokh, *supra* note 55, at 613.

144 Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640 (1981).

145 Tex. Monthly, Inc. v. Bullock, 489 U.S. 1 (1989).

146 Brownstein, *supra* note 47, at 612-25; *see also* Marshall, *supra* note 53, at 560 ("After *Widmar*, religious speech is speech—no more, no less.").

147 Brownstein, *supra* note 47, at 633-34.

The same analysis should apply, I believe, to cases involving free speech hybrid rights.[148] A free speech hybrid is only needed in cases where the free speech claim is too weak to succeed on its own, and this means that secular speech—speech that is *only* speech—would not receive constitutional protection. If a free speech hybrid claim prevails, religious speech is necessarily being treated more favorably than analogous secular speech. For example, a T-shirt bearing a religious anti-gay message might be protected when a shirt voicing the same sentiment from a secular point of view would not be.[149] This is, and ought to be seen as, unconstitutional content discrimination.[150] For these reasons, I think Brownstein is correct to say that the "strongest case against the use of a

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[148] Courts sometimes fail to recognize this. In *Axson-Flynn v. Johnson*, 356 F.3d 1277 (10th Cir. 2004), the Tenth Circuit endorsed the idea that religious speech should be treated neither better nor worse than secular speech, *id.* at 1292 n.13, yet was ready to remand a free speech/free exercise hybrid claim since on the state of the record it could not tell whether that claim would prove colorable, *id.* at 1297. The remand proved unnecessary since the court decided that the defendants would be entitled to qualified immunity on the hybrid rights claim in any event, *id.*, but the court should have recognized that any successful free speech hybrid claim would have treated religious speech more favorably on the basis of its religious content.

[149] I should briefly note one complication that receives little attention in my paper: the distinction between religious speech (i.e. speech that has religious content) and religiously motivated speech. The T-shirts discussed by Professor Bowman and my hypothetical scenarios involve speech that is both religious in content and religiously motivated. Preferring speech with religious content and motivation to analogous secular speech looks like a clear case of content discrimination. Some religiously motivated speech does not have religious content, however. A T-shirt reading "Abortion is Murder" might be worn for religious or nonreligious reasons. Brownstein, *supra* note 50, at 633-34. Would preferential treatment for speech that is (merely) religiously motivated constitute content- or viewpoint-based discrimination? Brownstein answers "yes," though the question is far from straightforward. *Id.* at 633-43.

[150] Note, too, that the content discrimination here is not a matter of disparate impact. The two shirts would be treated differently precisely because one is religious and the other is not. Nor can the content discrimination here potentially be justified under strict scrutiny. As Brownstein explains, the government cannot claim a compelling interest in compliance with the Free Exercise Clause, for the post-*Smith* Free Exercise Clause does not require preferential treatment for religious exercise. And to the extent the state might cite its interest in promoting a more expansive conception of free exercise rights than that provided by the Federal Constitution, analogous arguments were found insufficient to state a compelling interest in *Widmar v. Vincent*, 454 U.S. 263, 276 (1981). Brownstein, *supra* note 47, at 165-66. The Supreme Court's decision in *Locke v. Davey*, 540 U.S. 712 (2004), does not affect this argument. There, the Court recognized the state of Washington's interest in promoting greater separation of church and state in its own constitution than is required by the federal First Amendment as sufficient to justify excluding the plaintiff Davey from a scholarship program on the ground that he wished to pursue a degree in devotional theology. It was critical to the decision, however, that the Court applied a relatively deferential (and only vaguely defined) standard of review to Davey's claim and did not require the state to show that its Establishment Clause interests were compelling. *See id.* at 725 ("The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars."); *cf. also* Frank S. Ravitch, Locke v. Davey *and the Lose-Lose Scenario: What* Davey *Could Have Said But Didn't*, 40 TULSA L. REV. 255, 258 (2004) (suggesting that *Davey* "did not hold that the Washington constitution's establishment clause could effect federal Free Exercise Clause concerns, but rather that there were no actionable free exercise concerns given the play in the joints in the First Amendment").

hybrid rights analysis involves freedom of speech."[151] Though no court seems to have explicitly recognized these problems with free speech hybrids, it may be that some dim recognition of the constitutional difficulties lurking in the background is one reason why free speech hybrids have done so little work in the courts.

If this line of reasoning is correct, it suggests that to the extent religious activity is treated as speech at all, it must be treated *only* as speech in the sense that it should be afforded no greater protection than analogous nonreligious speech. This idea has the greatest intuitive appeal where the religious speech is "pure" in the sense that it is not inextricably bound with conduct, prayer, or ritual. In Professor Bowman's T-shirt cases, for example, religious and secular shirts seem so close to the core of conventional expressive activity and so analogous to each other that to grant greater protection to a religious shirt would immediately raise the specter of wrongful content discrimination.[152] But if we take seriously the principle that religious speech is speech, the consequences can quickly become rather alarming. All agree that lots of religious activity can be seen as speech, and courts often seem to go out of their way to characterize it this way.[153] But if religious speech—whether "pure" conventional speech or symbolic speech—can be treated no better than secular speech, both judicial *and legislative* free exercise exemptions begin to look like unconstitutional discrimination on the basis of speech content.[154] This would be an ironic result when the push to characterize religion as speech was prompted by a desire to enhance the protection of religious liberty, and it is a result few would welcome.[155]

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[151] Brownstein, *supra* note 47, at 192.

[152] *Cf. id.* at 183 (suggesting that religious activities like leafleting or solicitation are so similar to secular speech that they should be treated as speech rather than as the exercise of religion).

[153] *See* Stanley Ingber, *Religion or Ideology: A Needed Clarification of the Religion Clauses*, 41 STAN. L. REV. 233, 242-43 (1989) (noting that the Supreme Court has "often" treated religious exercise as speech and that the "extent to which nonreligious first amendment guarantees have pervaded the area of religious exercise is amazing").

[154] *See* Brownstein, *supra* note 47, at 164-69; *see also* Berg, *supra* note 140, at 981 n.73 (expressing worry that if pushed too far, the ideas that religion is speech and that government must treat speech in a content-neutral manner could wipe out accommodations for religious conduct); William P. Marshall, *The Religious Freedom Restoration Act: Establishment, Equal Protection and Free Speech Concerns*, 56 MONT. L. REV. 227, 244-47 (1995) (arguing that where religious activity can be "fairly characterized as implicating free speech protection," legislative exemptions for religious activity but not analogous secular activity violate the Free Speech Clause).

[155] The Supreme Court's decision in *Smith* largely rejected the idea of constitutionally compelled exemptions for religious exercise but seemed to welcome legislative accommodations of religion. Employment Div., Dep't of Human Res. of Or. v. Smith, 494 U.S. 872, 890 (1990). The Court's cases involving legislative accommodations of religious practice treat such accommodations quite favorably, as the Symposium contribution by Professor Esbeck makes clear. Carl H. Esbeck, *When Accommodations for Religion Violate the Establishment Clause: Regularizing the Supreme Court's Analysis*, 110 W. VA. L. REV. 359, 359 (2007) (stating that the Supreme Court has approached its modern accommodations cases "permissively" and that most legislative accommodations are upheld outside of a "narrow" range forbidden by the Establishment Clause). In addition, commentators who support *Smith* also tend to take a more favorable view of legislative

The stakes here are nicely illustrated by *Isaacs ex. rel. Isaacs v Board of Education of Howard County, Maryland.*[156] In that case, the school had adopted a "no hats in class" policy but made exceptions for religious headgear such as the yarmulke and the Muslim hijab.[157] The plaintiff wished to wear multicolored headwraps to school for the entirely secular reason that she wanted to celebrate her cultural heritage as an African-American and a Jamaican.[158] The court assumed that wearing the headwraps could count as speech, but rejected the plaintiff's claims under *United States v. O'Brien.*[159] In the most interesting part of the opinion, however, the court briefly addressed the plaintiff's argument that the religious exceptions to the "no hats" policy undermined its content-neutrality and thus should have prompted a more searching review. In effect, the argument was that the school had chosen to treat the religious symbolic speech of yarmulkes and hijab more favorably than the secular symbolic speech of her headscarves. While the court brusquely dismissed this argument,[160] I believe it cuts rather deeply by raising the possibility that discretionary exemptions involve content discrimination in favor of religious speech.

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exemptions for religious practice than of judicially-created exemptions. *See, e.g.*, HAMILTON, *supra* note 64, at 295-302 (arguing that legislative accommodations of religion are appropriate if judged by the legislature to be consistent with the public good); Eugene Volokh, *A Common-Law Model for Religious Exemptions*, 46 UCLA L. REV. 1465 (1999) (criticizing constitutionally compelled exemptions but championing RFRA regimes as a compromise that allows courts to have the first word about religious exemptions but gives legislatures the last word). For a more skeptical scholarly take on legislative exemptions, see Ira C. Lupu, *Reconstructing the Establishment Clause: The Case Against Discretionary Accommodation of Religion*, 140 U. PA. L. REV. 555 (1991).

156 40 F. Supp. 2d 335 (D. Md. 1999).

157 *Id.* at 336.

158 *Id.*

159 *Id.* at 336-38.

160 *Id.* at 338. The court suggested that "it does not automatically run afoul of the Constitution for the defendants to protect religious speech more strictly than non-religious speech[]" and that if the wearing of religious headgear is both speech and an exercise of religion, the "student would have the constitutional protection" of a free speech/free exercise hybrid and that "[t]his fact alone would provide ample basis" for the decision to exempt religious headgear from the "no hats" policy. *Id.* It is difficult to follow the court's reasoning here and to determine whether this reasoning should be considered dicta or holding. The court may be suggesting that the exemption must be permissible because it is probably *required* under hybrid rights analysis if we assume that the wearing of religious headgear constitutes symbolic speech. If that is the suggestion and the suggestion is essential to the opinion, this is the only decision I am aware of that uses a free speech hybrid to provide preferential treatment to religious speech. It will be obvious from everything written so far that I think this is misguided. To my mind, the only way to justify the school's policy is to treat the wearing of religious headgear as conduct rather than speech. I would also add that the court's imagined hybrid rights analysis seems problematic. If we imagine a student who wished to wear religious headgear challenging an exceptionless "no hats" rule, *Smith* dooms the free exercise claim and the speech claim looks like a sure loser under *O'Brien* for the reasons given by the *Isaacs* court. It is not clear to me how we have a colorable speech claim here, and thus the hybrid argument ought to fail. Intuitively, that would be a harsh result, but it seems to me the result that follows from *Smith*.

Some might respond to this case by saying, "Wearing headscarves and yarmulkes is just conduct, and there's nothing problematic about protecting religious conduct more than analogous secular conduct. This happens all the time, and the accommodation of the religious headgear is in keeping with our best traditions of religious liberty." Perhaps so, but this reaction only underlines the importance of deciding when religious activity should be treated as speech and when it should be treated as the exercise of religion. The push to maximize the sphere in which religious activity can be seen as speech has implications that courts have not yet faced, implications which have led Professor Brownstein to conclude that for the most part the law of religious liberty would fare better by treating religious activity as religion and only characterizing it as speech "sometimes" and "with caution."[161] If we focus only on judicially-mandated exemptions, the push to treat religious activity as speech may seem to offer only benefits for religious liberty because courts enforce the Free Speech Clause more vigorously than the Free Exercise Clause. But discretionary legislative and administrative exemptions that privilege religious activity over secular activity are commonplace,[162] and they are threatened when religious activity is treated as speech. I can see no principled way around this difficulty. If religious activity of a given sort counts as "speech" when a religious claimant raises First Amendment arguments in court, it ought also to count as "speech" when the religious activity is granted a legislative or administrative exemption in preference to analogous secular activity. And preference for religious "speech" over nonreligious speech should violate the Free Speech Clause and perhaps the Establishment Clause as well.[163] A legislature or executive agency could avoid

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[161] Brownstein, *supra* note 47, at 182.

[162] *See* James E. Ryan, Note, Smith *and the Religious Freedom Restoration Act: An Iconoclastic Assessment*, 78 VA. L. REV. 1407, 1446 (1992) (stating that over 2,000 statutes contain religious exemptions).

[163] Professor Brownstein may read *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1 (1989), and *Capitol Square Review and Advisory Bd. v. Pinette*, 515 U.S. 753 (1995), as suggesting that preferential treatment for religious speech would violate the Establishment Clause as well as the Free Speech Clause. Brownstein, *supra* note 50, at 619-24. I say "may read" because it is not entirely clear whether he means to make only the narrower claim that religious exemptions from content-neutral speech restrictions violate the Establishment Clause or the broader claim that preferential treatment for religious speech in any context violates the Establishment Clause. If he is making the broader claim, I am less confident that preferences for religious speech will always violate the Establishment Clause. As suggested in *Pinette*, it would certainly violate the Establishment Clause if the government gave religious speakers preferential access to a public forum. This would send a forbidden message of endorsement, *Pinette*, 515 U.S. at 766, and it would be difficult to see such preferential access as necessary to "alleviate[] exceptional government-created burdens on private religious exercise" under *Cutter v. Wilkinson*, 544 U.S. 709, 720 (2005). Still, the Court's cases on permissible accommodation certainly contemplate the permissibility of some preferential treatment for religion, and it is not implausible to believe that under some circumstances an accommodation for religious speech might satisfy the standards set out in *Cutter* and its predecessors. *Id.* (holding that the portions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), relating to prisoners are permissible accommodations of religion consistent with the Establishment Clause because they

this problem, of course, by broadening exemptions to include both religious and secular activity. This might be desirable,[164] but would not be without cost. Broader exemptions may threaten to undermine a law's effectiveness altogether, and forcing an all-or-nothing choice in this context might well reduce the overall number of exemptions granted.[165]

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alleviate exceptional government burdens on religious exercise, adequately consider the interests of nonbeneficiaries, and are administered neutrally among different religious faiths). Where religious speech is concerned, the argument that preferential treatment violates the Free Speech Clause strikes me as both simpler and more powerful than the Establishment Clause argument and hence I will focus on the speech argument here. *Cf.* Marshall, *supra* note 154, at 247 (suggesting that where the Free Speech Clause applies, it provides the strongest constitutional challenge to religion-specific exemptions like those created by the federal RFRA).

164 *See, e.g.*, Marshall, *supra* note 154, at 234 (suggesting that it would be sound policy, if not plausible statutory construction, to extend the protection of RFRA to matters of nonreligious conscience). It has also been argued that extending discretionary exemptions to nonreligious claimants is constitutionally required. *See, e.g.*, Lisa Schultz Bressman, *Accommodation and Equal Liberty*, 42 WM. & MARY L. REV. 1007, 1014-20 (2001) (arguing that a constitutional principle of equal treatment inherent in the Establishment Clause means that accommodations of religion are only permitted when the government is willing to extend the accommodation to "similarly situated non-religious claimants"); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 332 (1996) (stating that religious neutrality requires that "the law should protect nontheists' deeply held conscientious objection to compliance with civil law to the same extent that it protects the theistically motivated conscientious objection of traditional believers"). If religion-specific accommodations are per se unconstitutional, the question of their desirability as a policy matter would be moot, of course. Yet even though Justice Harlan's concurring opinion in *Welsh v. United States*, 398 U.S. 333, 357-58 (1970) (arguing that the Establishment Clause requires that nonreligious conscientious objectors be treated like the religious objectors Congress exempted from military service), supports this position to some extent, it seems well-established under the Supreme Court's subsequent cases that religion-specific accommodations are often consistent with the Establishment Clause. *See* Kent Greenawalt, *Establishment Clause Limits on Free Exercise Accommodations*, 110 W. VA. L. REV. 343, 344 (2007) (stating that the Supreme Court has never indicated that religion-specific accommodations are invalid although it is true that broader accommodations are less vulnerable to challenge under the Establishment Clause).

165 *See* Brownstein, *supra* note 47, at 169 (discussing the argument that extending religious exemptions to include analogous secular claimants becomes a "poison pill" for exemptions because it "loads up the pro-exemptions reading of the Clause [or writing of statutes] with liabilities so severe and costs so great that judges [or legislatures] will no longer buy it" (quoting with modifications Michael Stokes Paulsen, *God is Great, Garvey is Good: Making Sense of Religious Freedom*, 72 NOTRE DAME L. REV. 1597, 1603 (1997))).

Professor Gedicks nicely captures both sides of the argument about religion-specific exemptions in discussing

> [t]he dilemma of an exemption regime in a world of broad religious and moral difference, in which secular commitments have the same moral status as religious commitments, and in which it is common for individuals to manufacture their own idiosyncratic religions without the discipline of denominational boundaries: To avoid inequality and unfairness, exemptions must be extended beyond the traditional denominations to those with unusual religious beliefs, as well as to those whose beliefs are based upon secular morality. Yet, to extend the reach of exemptions so far would seriously undermine the observance, and thus the effectiveness, of law.

These points, if taken seriously, present some difficult choices. Treating religious activity as speech rather than religious exercise may enhance judicial protections for religion in some contexts, but should also place significant limits on discretionary religion-specific accommodations. To the extent one believes such accommodations are valuable and appropriate—a conclusion that appears to be widely if not universally shared[166]—this provides good reason for limiting the extent to which religious activity should be characterized as speech. Yet I suspect few would be willing to forswear altogether the idea of protecting religion as speech, especially given the relatively limited protections offered by current free exercise law.

Some sort of line drawing, then, appears desirable for pragmatic reasons if we want to allow courts and legislatures some meaningful space in which to promote religious liberty. Line drawing may also be necessary for constitutional reasons. For example, Professor Brownstein qualifies his cautious take on the treatment of religious activity as speech by noting that there are situations when "religious activities are so similar to secular speech activities that they should be treated as expression."[167] His examples of such situations include religious leafleting and door-to-door soliciting,[168] and it is easy to see the concern here. Whereas the speech embodied in prayer or liturgy has no obvious secular analogues, these activities are paradigm cases of conventional expression.[169] A law that allowed religious leafleting but not political leafleting, for example, would look more like unconstitutional speech discrimination than like a constitutionally permissible accommodation of religion. There is plenty of room for disagreement about how to draw the relevant line, but it is difficult to escape the thought that some religious activity is so speech-like that it must be treated on equal terms with analogous secular speech.

What seems to follow, then, is a division of the universe of religious activity into three spheres: activity that can only be seen as religious exercise (conduct), activity that may be seen either as religious exercise or as speech, and

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Frederick Mark Gedicks, *Religious Exemptions, Formal Neutrality,and Laïcité*, 13 IND. J. GLOBAL LEGAL STUD. 473, 483 (2006).

166 *See supra* notes 155, 164 and accompanying text (explaining that the Supreme Court and many scholars support discretionary religious exemptions but also noting that some scholars who support exemptions would require that the exemptions be extended to analogous secular claimants as well).

167 Brownstein, *supra* note 47, at 183; *see also* Stone, *supra* note 134, at 994-96 (1986) (discussing the "special embarrassment that exists when free speech and free exercise claims coalesce" and suggesting that the Court's refusal to privilege religious speech in *Heffron* may have been a function of "unwillingness to grant a special exemption to religious activity that would not be granted to essentially identical political activity").

168 Brownstein, *supra* note 47, at 183.

169 *Cf. id.* at 136 (observing that it would have been appropriate to decide *Texas Monthly* on speech grounds because "the publication of ideas in books and periodicals ... is a generic activity engaged in by secular and religious groups alike for the same essential free speech purpose of persuading readers of the merits of the beliefs being communicated").

activity that must be seen as speech.[170] Though I cannot attempt to develop a full account of such a division here, I suggest that most of the examples of conventionally expressive student religious speech discussed in the case law (including Professor Bowman's T-shirts with religious messages) fall in the category of religious activity that *must* be treated as speech. To revert to the hypotheticals given above,[171] it is difficult to see the privileging of religious anti-gay T-shirts over secular ones as anything other than content-based speech discrimination. The same could be said for allowing religious denunciations of Islam in classroom presentations but not secular denunciations, or allowing religious literature distribution but not secular literature distribution. In contrast, matters are more complicated if we compare, e.g., a student wearing a yarmulke with a student wearing a Chicago Cubs cap.[172] It is possible to see both the yarmulke and the Cubs cap as conveying messages of identification and affiliation and thus as speech, yet I suspect few would find it plausible to see a yarmulke as this *and nothing more*. Perhaps part of the difference stems from the sense that wearing a yarmulke is obligatory[173] in a way that wearing a Cubs cap or even a

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[170] It is largely common ground that some religiously motivated conduct cannot reasonably be seen as speech and hence is outside the protection of the Free Speech Clause. *See, e.g.*, Tushnet, *supra* note 47, at 77 (pointing to routine land use decisions by churches as examples of religiously motivated conduct that could not plausibly be seen as symbolic speech); Marshall, *supra* note 154, at 247 (noting that a landlord's religiously motivated refusal to rent to unmarried couples would probably not be considered speech for First Amendment purposes). Brownstein suggests that while there is some religious activity that must be treated as speech, a great deal of religious activity can plausibly be categorized either as speech or as religion. Brownstein, *supra* note 47, at 121-23. The bulk of his analysis is devoted to showing that within this sphere of choice, the costs of treating religion as speech outweigh the benefits. *Id.* at 146-85.

[171] *See supra* notes 90-92 and accompanying text (sketching T-shirt hypo); notes 100-103 and accompanying text (sketching class presentation hypo).

[172] The actual contrast in *Isaacs ex rel. Isaacs v. Board of Education of Howard County, Maryland*, 40 F. Supp. 2d 335 (D. Md. 1999), between a headwrap reflecting cultural heritage and religious headgear such as a yarmulke presents a closer case. If the two are treated as speech, it should be unconstitutional to exempt the yarmulke but not the headwrap from the schools "no hats in class" policy. Yet, as suggested in the text, I think the wearing of the yarmulke is better conceived as religious exercise than as speech. The case then poses the question of whether the state may permissibly prefer religious conduct over analogous secular conduct, and (despite lively scholarly debate on the matter) the case law by and large suggests that it can. *See supra* note 49 and accompanying text; *supra* note 164. The question posed by this example may seem sharper because a symbol of cultural identification (unlike a Cubs caps) might be thought to reflect a claim of significant strength on the wearer. My colleague Charles DiSalvo, however, has led me to understand that identification with the Chicago Cubs can also be a very serious business.

[173] Questions about the exact parameters of the obligation to wear a yarmulke are disputed within Jewish law, and I have neither the need nor the competence to go into such matters here. It is enough to say that for at least some observant Jews the wearing of a yarmulke during the school day would be experienced as a religious obligation. *See* Yehuda M. Braunstein, Note, *Will Jewish Prisoners Be* Boerne *Again? Legislative Responses to* City of Boerne v. Flores, 66 FORDHAM L. REV. 2333, 2337-38 (1998) (stating with citations to the Babylonian Talmud and other sources that many Jewish authorities hold that it is forbidden to travel even a very small distance without wearing a yarmulke).

T-shirt with a religious message condemning homosexuality is not. It seems natural to say that students wishing to express their views about the Cubs or about homosexuality are free to do so at other times and places. As Stone suggests, the needs of speakers to communicate can usually be met through a variety of means and a given mode of activity may seem more or less speech-like depending on the extent to which alternative means of expression would be satisfactory.[174] Where they would not be, speech and religious activity do not seem to be on all fours.[175]

Needless to say, the remarks just offered are only the most minimal gestures in the direction of a theory for determining when religious activity must be treated as speech and hence must not be preferred to secular speech. Thinking about whether a given sort of religious activity is more closely analogous to paradigmatic instances of "speech" or to paradigmatic instances of "religious exercise" is of some help, but can only take us so far.[176] We need doctrinal tools, but relatively little work has been done to craft an approach that would help courts draw the appropriate lines.[177] What might seem the most natural

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[174] *See supra* notes 134-138 (summarizing Stone's discussion of this point).

[175] On the line of reasoning just advanced, the presence of a strong obligation to engage in expressive conduct often suggests that we are dealing with speech that is not closely analogous to ordinary secular speech and hence may be treated as religious exercise rather than speech. While this point casts some light, the case law also contains indications that even obligatory religious speech that is conventionally expressive may not be privileged over analogous secular speech. In *Heffron*, the Krishnas argued that their literature distribution involved an obligatory religious ritual called Sankirtan, but this did not keep the Court from stating that the ritual character of their practice gave them no greater rights than nonreligious groups. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 652-53 (1981). Professor Stone suggests two ways of explaining this result. One possibility is that the Court thought that there was no duty to perform Sankirtan at any particular place and time, and therefore regarded the challenged regulations as only a minimal interference with religious obligation. Stone also suggests, however, that even if Sankirtan was seen as fully obligatory, the Court "may have been loathe to grant a preference to religious activity that is not granted to essentially identical political activity." Stone, *supra* note 134, at 995.

[176] One limitation in an approach based on paradigm cases is that the Supreme Court's decisions appear to erase most of the distance between the speech and religion paradigms by treating even core religious activities like worship and prayer as speech. *See* Widmar v. Vincent, 454 U.S. 263, 265, 269-74 (1981).

[177] Eugene Volokh has suggested three possible approaches that courts might use in deciding when religious activity must be treated as speech and therefore made subject to Speech Clause restrictions against content discrimination. (His specific proposals are focused on the question of when religious speech should be excluded from the protection of RFRA statutes, but I think the ideas are generalizable.) In addition to proposing use of the *Spence* test, which I discuss below, he also suggests (1) that courts might treat religion as speech only in relation to laws that facially govern speech activity, and (2) that courts could determine on a case by case basis whether preferential treatment of religious speech would be likely to skew public debate. Volokh, *supra* note 55, at 615-16. Either of these approaches would suggest that conventional student religious expression like message-bearing T-shirts should generally be treated as speech. Much (though probably not all) student religious speech is restricted by school regulations that facially govern speech: anti-harassment policies, literature distribution policies, and so on. Volokh's first approach would therefore suggest that religious student speech could not be given preferential treatment under such policies without violating the Free Speech Clause. Volokh's second approach would also

approach, applying the *Spence* test,[178] seems problematic in at least two respects. First, the test does not provide predictable answers for many instances of religious activity [179] and might well treat as speech a sufficiently wide swath of that activity to call into question substantial numbers of religion-specific legislative exemptions.[180] Second, I believe Professor Post has shown that the *Spence* test is poorly suited even for the job of deciding when communicative conduct *may* be treated as speech for First Amendment purposes.[181] If that is so, there is little reason to think the test would prove useful in deciding when speech-like religious activity *must* be treated solely as speech for First Amendment purposes.

Post's criticisms of *Spence* may suggest a path toward a more adequate account of when religious activity must be treated as speech. To briefly summarize, Post suggests that the *Spence* test fails to state a sufficient condition for the

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suggest that at least the sorts of controversial religious speech discussed by Professor Bowman should be treated as speech. On issues like homosexuality and abortion, preferential treatment of religious speech would (at least in many communities) significantly skew debate in fairly predictable ways.

178 Spence v. Washington, 418 U.S. 405, 410-11 (1974); *supra* note 46 (describing the test).

179 For example, the question of whether particular religious rituals are sufficiently likely to be understood as communicating a particularized message to count as speech can be a hard one to answer. *Cf.* Tushnet, *supra* note 47, at 75-76 (suggesting that Christian communion would count as symbolic speech while the ritual use of peyote in Native American religions might not since any message the latter ritual is meant to convey would likely be missed by the audience).

180 If *Widmar* teaches that worship is speech, for example, this may suggest that exempting churches, but not secular associations, from land use regulations violates the Free Speech Clause. *See* Brownstein, *supra* note 47, at 167-68 (suggesting that if religion is treated as speech, the land use provisions of the Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA), 42 U.S.C. §§ 2000cc to 2000cc-5 (2000), should be seen as unconstitutional viewpoint discrimination in favor of speech by religious institutions). The point that treating religion as speech threatens religion-specific accommodations is important and, I think, underappreciated. But the point has limits and does not threaten all religion-specific accommodations. Consider, for example, an exemption for religious peyote use from a general drug law or an exemption for the consumption of wine in religious ceremonies from a general law banning alcohol consumption. The law governing permissive accommodations suggests possible grounds on which such exemptions might be challenged. Are they denominationally neutral? Do they place undue burdens on nonbeneficiaries (i.e. persons not exempted from the general law)? *See* Cutter v. Wilkinson, 544 U.S. 709, 720 (2005). But even if we see the ritual use of wine or peyote as symbolic speech, it is hard to see these exemptions as unconstitutional preferences for religious speech because (so far as I am aware) nonreligious uses of peyote and alcohol are not speech at all. One could argue that singling out religious peyote or wine consumption violates a constitutional ideal of equal liberty in some more general sense, *see* Bressman, *supra* note 164, at 1029 (discussing the hypothetical question of whether a legislature could exempt religious peyote use without exempting medical use for the alleviation of suffering), but I do not see how preferring speech to nonspeech could be said to violate the Free Speech Clause.

181 Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1252- 55 (1995) (arguing that the *Spence* test is "transparently and manifestly false" because it fails to recognize that First Amendment values "do not attach to abstract acts of communication as such, but rather to the social contexts that envelop and give constitutional significance to acts of communication").

classification of human activity as speech because "it locates the essence of constitutionally protected speech exclusively in an abstract triadic relationship among a speaker's intent, a specific message, and an audience's potential reception of that message" and fails to appreciate the ways in which social context determines when instances of communication trigger the protection of the First Amendment.[182] Not all intentional communications count as First Amendment speech.[183] To use one of Post's examples, navigation charts for airplanes are intended to convey messages which will be understood by the relevant audience, but courts do not treat such charts as speech.[184] According to Post, this suggests that First Amendment speech "presuppose[s] and embod[ies] a certain kind of relationship between speaker and audience" that could be described as "dialogic and independent" because it is assumed that the audience will "autonomously query the[] meaning and authority" of the communication.[185] In contrast, navigation charts "speak[] monologically to their audience," inviting it to "assume a position of dependence and to rely on them."[186] Post's general point is that we must understand the First Amendment's Speech Clause as protecting acts of communication in the context of some social practices but not others. This insight, I think, might provide a good starting point for thinking about when religious activity should be treated as speech and when it should be treated as religious exercise. If communication has First Amendment value by virtue of its locations in various sets of social practices, it is equally true that activity is seen as "religious" only within the context of complex social practices and that its value as an object of First Amendment protection must be understood in the context of those practices.[187] Perhaps if we can understand why certain social practices warrant protection as "speech," we can also understand why other practices warrant protection as "religion."[188] Reflection along these lines might

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182 *Id.* at 1252.

183 For example, Post points out that no court would consider the prosecution under laws prohibiting the defacement of public property of a person who spray-painted "Down with Clinton" on a city bus as raising First Amendment issues. *Id.*

184 *Id.* at 1254.

185 *Id.*

186 *Id.*

187 I hope it is obvious that my description of religion as situated within a complex of social practices is meant to state a bland and obvious truth, not to offer any controversial "reductionist" account of religion. Religion may be both a social practice and a link to the transcendent. Much academic writing about religion, including the present article, pays relatively little attention to "religion" as a category and the ways in which presuppositions about the meaning and nature of that category may skew analysis. One notable exception here is the work of Winnifred Fallers Sullivan, who uses her background in the academic study of religion to query the categories of "religion," "law," and the interactions between them in her books PAYING THE WORDS EXTRA: RELIGIOUS DISCOURSE IN THE SUPREME COURT OF THE UNITED STATES (1994) and THE IMPOSSIBILITY OF RELIGIOUS FREEDOM (2005).

188 Admittedly, the latter task seems particularly daunting since there seems to be less agreement about why the Constitution should protect the exercise of religion than about why it should protect speech. *See, e.g*, Feldman, *supra* note 63, at 457 ("[N]o single theoretical justification for

yield a better approach than *Spence* for deciding when religious activity must be treated as speech.

I say "might yield" advisedly, however, for the project just sketched could turn out to be a fool's errand. Perhaps the reality is that most religious activity is always *both* religion *and* speech, and that within this sphere of activity there is simply no way to draw a line between religious activity that should be treated solely as speech for constitutional purposes and religious activity that should be protected only as religious practice. Even so, I think the task is worth undertaking because the other possibilities, though perhaps simpler to implement, have significant difficulties of their own. To treat all religious activity that can be understood as speech solely as speech creates significant problems for many religion-specific legislative exemptions, but to treat no religious activity as speech is to cast off much of the protection that religion has historically enjoyed under the First Amendment. The course that may seem most appealing to some with a "religionist" orientation would be to say that religious activity is doubly protected by the Free Speech Clause and the Free Exercise Clause and that particular religious claims should be analyzed as speech or religion depending on which classification will yield the greatest level of protection. It may be that courts and litigants think this way at some level, for the case law is largely consistent with the idea that religious activity counts as speech when religious claimants seek relief from judges but counts as the exercise of religion when legislatures or administrators dispense discretionary religious exemptions. The case law has rarely shown any awareness of the possibility that speech principles might cut against exemptions for religious activity.[189] Nonetheless, this course ultimately strikes me as unprincipled, and perhaps it is for this reason that it rarely receives explicit defense or even acknowledgment.[190] Given this range of options and consequences, I think the project of drawing lines that indicate when religion must be treated as speech is worth exploring.

If the task proves completely unworkable, I believe the most defensible alternative would be an "equal regard" approach that would require *all* religious exemptions—legislative or judicial, speech or conduct—to be extended to

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the broad protection of religious freedom enjoys the near-universal support that is accorded to the self-governance rationale for free expression."); Bressman, *supra* note 164, at 1027-28 (stating that "[t]here is no consensus for why we protect religious liberty" and providing some representative citations to the substantial literature exploring the justifications for religious liberty protection).

189 Following the lead of Justice White's concurrence in *Texas Monthly v. Bullock*, 489 U.S. 1 (1989), some courts have seen religion-specific accommodations as violations of the Press Clause in cases involving tax exemptions for religious publications. *See, e.g.*, Budlong v. Graham, 488 F. Supp. 2d 1252, 1257-58 (N.D. Ga. 2007) (holding that exemption from sales tax for newspapers owned and operated by religious institutions and books of holy scripture violated the Press Clause because it was content discrimination not in the service of a compelling interest). But outside this context, there is little evidence that courts are considering (or even being asked to consider) the Speech Clause implications of religion-specific accommodations.

190 *See supra* note 76.

analogous secular speech or conduct.[191] One significant advantage of such an approach is that it would eliminate the need to decide whether religious activity is speech or conduct for constitutional purposes,[192] for the need to make that distinction is driven by the understanding that religious conduct may be privileged over secular alternatives but religious speech may not. The downsides here are also well-known. It is vigorously disputed whether the First Amendment should be read to require such an approach,[193] and it can also be argued that as a policy matter the approach would overly limit the willingness of government officials to accommodate religious practice.[194]

These larger questions about the characterization of religious activity as speech or religious exercise are far too complex to attempt to resolve here, but they deserve more attention than they usually receive. It is one of the benefits of Professor Bowman's treatment of the religious T-shirt cases that it provides an illuminating entry point for these questions. For present purposes, I want to insist only on the claims that (a) there are some kinds of religious activity that *must* be treated as speech, (b) that most instances of conventionally expressive student religious speech (including the T-shirts discussed by Professor Bowman) fall in that category if anything does, and (c) that when religious activity is treated as speech, preferential treatment of that speech should be seen as unconstitutional content- or viewpoint-based discrimination. If these claims are correct, constitutional principles actually mandate that the Free Speech Clause should do the heavy lifting in cases involving conventional forms of student religious expression like the wearing of T-shirts bearing religious messages. To provide student religious speech with additional protection because it is also the exercise of religion would violate the Free Speech Clause. That is why student religious speech must be protected only as speech.

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191 An approach of this kind is broadly consistent with the "equal regard" or "equal liberty" approach developed in the writings of Eisgruber and Sager listed in note 49 *supra*. *See also* William P. Marshall, *What is the Matter with Equality?: An Assessment of the Equal Treatment of Religion and Nonreligion in First Amendment Jurisprudence*, 75 IND. L.J. 193, 202-05 (2000) (arguing that general constitutional principle of equality requires that all free exercise exemptions be extended to analogous nonreligious claimants).

192 Bressman explains that one benefit of her "equal liberty" approach to accommodation, which requires that religious accommodations be extended to analogous secular claimants, is that it "avoids the need to distinguish between exemptions for religious speech and those for religious practice." Bressman, *supra* note 164, at 1020 n.48. She contrasts her approach with analytical approaches like the one I have sketched that use speech/conduct classifications to determine whether religious exemptions ought to be evaluated under "general accommodation principles or more stringent speech standards." *Id.*

193 *See, e.g*, McConnell, *supra* note 76, at 6-9, 28-38 (arguing that the First Amendment mandates special treatment for religion and criticizing approaches that require equal treatment for religion and nonreligion).

194 *See supra* note 165 and accompanying text.

IV. CONCLUSION

Professor Bowman's paper begins from the proposition that the Free Speech Clause provides the vast majority of the religious liberty protection that public school students enjoy today, and raises important questions about the limits of that protection. I have tried to supplement her analysis by saying more about why and how the Free Speech Clause has come to be the tail that wags the Free Exercise dog in the public schools. Many of these reasons are prudential and depend on the relative weakness of free exercise doctrine compared to speech doctrine. Yet lurking in the background, I believe, is the constitutional principle that once one decides to treat religion as speech, it cannot receive preferential treatment in relation to analogous secular speech. This may be one reason why free speech hybrid claims have failed to affect outcomes in student speech litigation even though the weaker speech standards in the school setting might suggest that hybrid claims would flourish there. In the end, exploring cases of religious student speech like the provocative T-shirts discussed by Professor Bowman sheds light on the importance of basic questions about the categorization of religious activity as speech or as the exercise of religion. There are few easy answers in this area, and global solutions all have significant difficulties.

To treat religious activity entirely as speech is to adopt a flattened conception of religion, and may call into question significant parts of the vast framework of legislative exemptions viewed so favorably by the Supreme Court. To treat religious activity entirely as the exercise of religion would be a tough pill for many to swallow while *Smith* is still the law, and in any event there seem to be limited categories of religious activity that are so similar to conventional speech that they *must* be treated as speech. This means that difficult line drawing may be required, and no court or commentator has provided much of an idea about how this might be done. It is one thing to suggest, as I have, that T-shirts with religious messages are pure speech while the wearing of headgear like yarmulkes or hijab is religious conduct. It is another thing to explain why that should be so, and to create administrable standards for drawing the proper lines. One can avoid this sort of line-drawing by regarding the Free Exercise Clause as a "one-way ratchet" so that religious activity characterizable as speech always receives at least as much protection as the Speech Clause provides, and sometimes more. This would be an attractive picture to some, but to my mind it presses the idea of religious liberty as a preferred freedom farther than it should go. Some religious activity, including most instances of conventional religious expression in the public schools, is so similar to secular speech that the government may not prefer it to that speech without violating the Free Speech Clause. The most viable alternative to line drawing would be to extend the equal treatment principles that must apply to religious speech to all religious exercise by adopting some version of an equal regard approach. In either case, religious speech would enjoy no greater constitutional protection than nonreligious speech.